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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 454

CLAIBORNE-ANNAPOLIS FERRY COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, CHESAPEAKE BEACH RAILWAY COMPANY, AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED OCTOBER 12, 1931

(36,268)

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[fol. 4]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING AN EQUITY COURT

Equity. No. 52254

CLAIBORNE-ANNAPOLIS FERRY COMPANY, a Corporation, Plaintiff,

vs.

CHESAPEAKE BEACH RAILWAY COMPANY, a Corporation, and Frank McManamy, Balthasar H. Meyer, Clyde B. Aitcheson, Joseph B. Eastman, Ernest I. Lewis, Ezra Brainard, Jr., Claude B. Porter, Patrick J. Farrell, Hugh M. Tate, William A. Lee, C. D. Mahaffie, Individually and as Members of the Interstate Commerce Commission, Defendants

BILL OF COMPLAINT FOR INJUNCTION—Filed December 24, 1930

The plaintiff respectfully shows to the Court as follows:

1. That it is a corporation organized under the laws of the State of Maryland and brings this suit in its own right.

2. The defendant, Chesapeake Beach Railway Company, is a corporation organized under the laws of the State of Maryland, having its principal office and place of business in the District of Columbia and is the petitioner before the Interstate Commerce Commission in the proceedings hereinafter set forth, and is sued in its own right.

3. The defendants, Frank McManamy, Balthasar H. Meyer, Clyde B. Aitcheson, Joseph B. Eastman, Ernest I. [fol. 5] Lewis, Ezra Brainard, Jr., Claude B. Porter, Patrick J. Farrell, Hugh M. Tate, William A. Lee and C. D. Mahaffie, are citizens of the United States and comprise all the members of the Interstate Commerce Commission and are sued individually and as members of the said Interstate Commerce Commission.

4. That this suit is brought pursuant to and under the provisions of Chapter 2, Section 41, Paragraph 28, and Section 43 of the Judicial Code of the United States, which confer jurisdiction on this court of these proceedings as follows:

"Setting Aside Order of Interstate Commerce Commission.—Twenty-eight. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. (June 18, 1910, c. 309, § 1, 36 Stat. 539; Mar. 3, 1911, c. 231, § 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)

"43. Venue of Suits Relating to Orders of Interstate Commerce Commission.—The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination" shall be construed as meaning final destination of such shipment." (Oct. 22, 1913, c. 32, 38 Stat. 219.)

5. That the plaintiff is, and for a long period of time has been engaged in the business of maintaining, operating and conducting a ferry service wholly within the State of Maryland between the City of Annapolis, in Anne Arundel County, on the western shore of Maryland, and the town [fol. 6] of Claiborne, in Talbot County, and Matapeake Terminal, Queen Anne's County, on the eastern shore of said State, operating ferry boats between said points daily and carrying therein passengers and freight for hire. That the plaintiff operates said ferry business by virtue of a franchise granted it by the State of Maryland and has

expended large sums of money for ferry boats, wharves, ticket offices, freight offices and other equipment and appurtenances necessary for maintaining an adequate transportation service for freight and passengers across the waters of Chesapeake Bay between the points aforesaid. For a period of many years the business of plaintiff was unprofitable, but during the past six years, by reason of the expenditure of large sums of money to increase the efficiency of its service, it has been able, for the first time, to show an operating profit.

6. In the month of September, 1891, the Washington and Chesapeake Beach Railway Company was chartered by the State of Maryland to construct and operate a line of railroad from a point in the District of Columbia in a southeasterly direction, to certain points on the Chesapeake Bay. The charter of the said Washington and Chesapeake Beach Railway Company authorized it to "run and employ steamboats or other vessels to connect said railroad or railroads with other points by water communication." This was and is the only authority vested in said Washington and Chesapeake Beach Railway Company to operate a ferry service. On, to wit, the 7th day of March, 1896, the defendant, Chesapeake Beach Railway Company, acquired title to the property, rights, and privileges theretofore belonging to the said Washington and Chesapeake Beach Railway Company. Since the incorporation of said defendant, its activity has consisted solely in maintaining [fol. 7] and operating a steam railroad carrying passengers and freight for hire from a point just within the District of Columbia near the Maryland line to the town of Chesapeake Beach, Maryland, a distance of about twenty-nine (29) miles. Said town of Chesapeake Beach, Maryland, is in a southeasterly direction from the District of Columbia and is a summer resort and amusement park.

7. That on, to wit, the 26th day of December, 1929, the said defendant, Chesapeake Beach Railway Company, filed an application before the Interstate Commerce Commission for a certificate of public convenience and necessity for the extension of its line by establishing and operating a ferry, for the transportation of passengers and property between Chesapeake Beach in Calvert County, Maryland, across Chesapeake Bay, to a point on Trippe's

Bay in Dorchester County, Maryland, said application being known among the records of the Interstate Commerce Commission as Finance Docket No. 8013. Said application was filed pursuant to paragraphs 18 to 21, inclusive, of Section 1 of the Interstate Commerce Act, as amended. Paragraph 18 of said Act provides:

"No carrier by railroad subject to this chapter, shall undertake the extension of its line of railroad, or the construction of a new line of railroad or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad, subject to this chapter, shall abandon it or any operation of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

[fol. 8] The said Interstate Commerce Act, as amended, defines the term "railroad" to include "vessels used by or operated in connection with any railroad * * *."

Upon the filing of said application of the said defendant railway, as aforesaid, hearings were had, pursuant thereto, before the Interstate Commerce Commission, in which hearings this plaintiff intervened, after leave being first had and obtained. In said proceedings and in the record thereof, it appeared and does now appear that the present and/or future public convenience and necessity do not and will not require the extension of the railway line of the defendant railway by the operation of a ferry to be used by or in connection with said railway but, on the contrary, said proceedings before the said Interstate Commerce Commission and the order of said Commission show that the only public convenience and necessity, if any, to be served by the establishment and/or operation of a ferry between the points contemplated by the defendant will be in furnishing a general ferry service, entirely within the

State of Maryland, for the transportation of automobiles and trucks and passengers and freight in said automobiles and trucks, and that the operation of such ferry for such transportation will have no connection whatsoever with or use by the railway of the defendant, Chesapeake Beach Railway Company or any other railway.

It further fails to appear in said proceedings that the defendant, Chesapeake Beach Railway Company, has or will have any actual use whatsoever for the said ferry in connection with its railway.

8. On, to wit, the 8th day of August, 1930, the defendants, members of the Interstate Commerce Commission, passed an order providing that the present and future public con-
[fol. 9] venience and necessity required the establishment by the Chesapeake Beach Railway Company of a ferry service across Chesapeake Bay in Calvert and Dorchester Counties, Maryland, the said order being the certificate of public convenience and necessity hereinbefore referred to. That said order, in effect, provides for the construction, operation and maintenance of a general ferry wholly within the State of Maryland and from one point on the Chesapeake Bay to another.

9. That the foregoing considered, the said order of the Interstate Commerce Commission is null, void and of no effect in that the said Interstate Commerce Commission had and has no jurisdiction to provide for or authorize the construction, operation and/or maintenance of the ferry herein referred to for the following reasons:

(a) That the proceedings before the Interstate Commerce Commission show that the defendant railway has no actual use for said ferry in connection with its railway and that unless said ferry is for use by said railway or in connection with said railway, the said Interstate Commerce Commission has no power or jurisdiction to authorize its establishment and/or operation.

(b) That, even if any actual use of said ferry were contemplated by the defendant railway, in connection with its railway line, nevertheless, the proceedings before the Interstate Commerce Commission show conclusively that there is no present or future public necessity and/or convenience requiring the establishment and/or operation of

said ferry in connection with the defendant railway line but that, on the contrary, the only public convenience and necessity, if any, requiring the establishment and/or operation of said ferry between the points mentioned is for the [fol. 10] operation of a general ferry entirely within the State of Maryland and independent of and in no manner connected with defendant's railway line and that, under such circumstances, the Interstate Commerce Commission is without power or jurisdiction to authorize the establishment and/or operation of such ferry, and

(c) That the said order of the Interstate Commerce Commission pretends to authorize the defendant railway company to engage in an activity beyond the scope of its charter powers.

10. That the defendant, Chesapeake Beach Railway Company, under the pretended authority of the aforesaid order of the Interstate Commerce Commission, has proceeded with, or is about to proceed with the construction and operation of said ferry business, independent of its said railroad as aforesaid, and that unless restrained by this Court, will so proceed with the construction and operation of the ferry as aforesaid.

11. That unless this Honorable Court will set aside and annul said order of the Interstate Commerce Commission and restrain the defendant railway company from the construction and operation of the ferry as aforesaid, this plaintiff will suffer permanent and irreparable damage and injury in that the operation of the proposed ferry of the defendant at a point fifteen or twenty miles below the terminals and line of traffic of the plaintiff's ferry, and in competition therewith, will deprive the plaintiff of its customers, patronage and business, causing it financial disaster and the loss of a large amount of capital invested in its enterprise. And in fact the operation and maintenance of the proposed ferry by the defendant in competition with that of the plaintiff will prove disastrous to both, inasmuch as there is not, and will not be, sufficient passenger [fol. 11] and freight traffic to create a profit for both, but to the contrary, will cause an operating loss to both.

Premises considered, petitioner respectfully prays:

1. That the writ of subpoena issue commanding the defendants, and each of them, to appear and answer the exigencies of this Bill of Complaint.

2. That a preliminary injunction issue restraining the defendant, the Cheasapeake Beach Railway Company, from proceeding with the construction, maintenance and operation of a ferry business as in the Bill of Complaint alleged, pursuant to the said order of the Interstate Commerce Commission of August 1, 1930.

3. That a final and permanent injunction issue restraining the defendant, the Chesapeake Beach Railway Company, from constructing, maintaining and operating a ferry business as in the Bill of Complaint alleged, pursuant to the said order of the Interstate Commerce Commission of August 1, 1930.

4. That it be adjudged, ordered and decreed that the said order of the Interstate Commerce Commission of August 1, 1930, be set aside and annulled and held for naught.

5. For such other and further relief as to the Court may seem just and proper.

Claiborne-Annapolis Ferry Company, by John M. Dennis, Vice-President. Philip B. Perlman, Jesse I. Miller, Peyser, Edelin & Peyser, 1518 K St., Attorneys for Plaintiff.

[fol. 12] *Duly sworn to by John M. Dennis. Jurat omitted in printing.*

[fol. 13] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER OF DEFENDANT CHESAPEAKE BEACH RAILWAY COMPANY—Filed February 2, 1931

The Chesapeake Beach Railway Company, a corporation organized under the laws of the State of Maryland, hereinafter called the Railway, defendant in the above entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of

exception to the many errors and insufficiencies and inaccuracies in the complainant's said bill of complaint contained, for answer thereto or unto so much and such parts thereof as this defendant is advised that it is material to make answer unto, says:

1, 2, 3. Answering paragraph 1, 2 and 3 of the bill of complaint the defendant Railway admits that the allegations therein contained are true. The Railway alleges that [fol. 14] there is a non-joinder of necessary parties defendant in that the United States is not joined as a defendant in an action to set aside and annul the order of the Interstate Commerce Commission, as required by the statute in such cases made and provided. Section 211 of the Judicial Code of the United States.

4. Answering paragraph 4 of the bill, the Railway denies that Chapter 2, Section 41, Paragraph 28, and Section 434 of the Judicial Code of the United States confer jurisdiction on the Supreme Court of the District of Columbia to entertain these proceedings, since those statutory provisions confer jurisdiction for the review of orders of the Interstate Commerce Commission exclusively upon the District Courts of the United States, and this court is not one of such courts.

5. Answering paragraph 5 of the bill, the Railway admits the truth of the allegations therein contained, except that it has no information or knowledge that the plaintiff, Claiborne-Annapolis Ferry Company possesses a franchise granted it by the State of Maryland, or that it carries freight for hire. The Railway, however, avers that the facts recited in this paragraph are immaterial in this proceeding.

6. Answering paragraph 6 of the bill of complaint the Railway admits the truth of the facts therein set forth, except that it alleges that the charter of the Washington & Chesapeake Railway Company, to which the defendant Railway has succeeded, authorizes the company to locate and operate a continuous line of railway from the District of Columbia to Chesapeake Bay "with the privilege of constructing such docks, piers, bridges and retaining walls along the bay shore as may be necessary", and provides further that it might also, "purchase, hold, own, sell, lease

or otherwise dispose of such lands and premises at the terminal at Chesapeake Bay as may be essential for the establishment at the said terminal of a permanent seaside [fol. 15] resort not exceeding in the aggregate 3,000 acres", and provides further that the president and directors of the company were, "invested with all the rights and powers necessary to the construction, working, use and repair of its said railroad, with such branches at any point of said railroad not exceeding twenty miles in length, as the said president and directors may determine; * * * make or cause to be made, lateral railways in any direction from the said railroad, * * * any may also own and employ steamboats or other vessels to connect the said railroad or railroads with other points by water communication," and except further that the defendant Railway alleges that it possesses further authority for the operation of a ferry service by virtue of the order of the Interstate Commerce Commission of August 1, 1930 in Chesapeake Beach Ry. Co. Ferry, 166 I. C. C. 293, granting it the certificate complained of in plaintiff's bill for -junction, and except further that the defendant Railway alleges that it is an interstate carrier by railroad with a line extending from Chesapeake Junction, D. C., 2.04 miles to the District-Maryland line, thence to Upper Marlsboro, Owings and other Maryland towns to the town of Chesapeake Beach, Maryland.

7. Answering paragraph 7, the Railway admits the truth of the allegations respecting the filing of its application before the Interstate Commerce Commission in Finance Docket No. 8013 under section 1 (18) to (20), and respecting the intervention of the plaintiff in such proceeding before the said Commission. But the Railway denies the remaining allegations in said paragraph.

8. Answering paragraph 8, the Railway admits the facts but avers that it is called upon neither to affirm nor deny [fol. 16] the conclusion, therein expressed.

9. Answering paragraph 9, the Railway denies the allegations therein contained and alleges that on December 26, 1929, it filed an application under section 1 (18- to (20) of the Interstate Commerce Act for a certificate that the present and future public convenience and necessity require the extension of its existing line of railroad by establishing and operating a ferry across Chesapeake Bay

between Chesapeake Beach and a point on Trippe's Bay near Hudson in Calvert and Dorchester Counties, Maryland; that the proceeding was designated as Finance Docket No. 8013, Chesapeake Beach Ry. Co. Ferry; that in accordance with the provisions of section 1 (19) of the Interstate Commerce Act, notice of the application was given to, and a copy thereof filed with, the Governor of the State of Maryland, with the right to be heard in respect of the matter, and in answer to the notice so given the Public Service Commission of Maryland advised the Interstate Commerce Commission it did not desire to make any representations in the proceeding; that the plaintiff herein was permitted to intervene in such proceeding and filed a petition of invervention opposing the granting of the application upon the sole ground that the public convenience and necessity did not require the establishment of the proposed ferry and that the operation thereof by the Railway would interfere with and hamper the efforts of the plaintiff to give adequate service on its route; that by the notice so given by the Public Service Commission of Maryland to the Interstate Commerce Commission and by the petition of intervention filed by plaintiff the issues in said proceeding were thus limited to those raised by said petition of intervention, to wit; whether the public convenience and necessity required the establishment of the proposed ferry and whether the operation thereof by the Railway would interfere with and hamper the plaintiff in [fol. 17] its efforts to give adequate service on its route; that upon the issues thus raised the Commission set the matter down for hearing and accorded the parties to said proceeding the full hearings provided under said Act; that at said hearings a large volume of testimony and other evidence bearing upon the application was submitted to the Commission for consideration, including testimony and evidence submitted on behalf of the intervener, who is plaintiff in this suit; that at said hearings, and subsequently on briefs, the questions relating to said application were fully argued and submitted to the Commission for determination; and that the Commission determined said matters and made and entered and served upon all of the parties to said proceeding a report and order dated August 1, 1930, which report and order is attached hereto and made a part of this answer, wherein the Commission found that the

present and future public convenience and necessity require the establishment of ferry service by the defendant Railway across Chesapeake Bay in Calvert and Dorchester Counties, Maryland, as set forth in the application.

The Railway further alleges that said findings and conclusions were and are fully supported and justified by the evidence submitted to the Commission at said proceeding as aforesaid.

The Railway further alleges that in making said report and order of August 1, 1930 the Commission considered and weighed carefully, in the light of its own knowledge and experience, each fact and circumstance and condition called to its attention on behalf of the parties to said proceeding, including all matters called to its attention by the intervener, who is plaintiff in this suit.

The Railway further alleges that said order of August 1, 1930 was not made or entered by the Commission con- [fol. 18] trary to the revelant evidnece or without evidence to support it; that in making said order the Commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner.

Answering further the allegations in said paragraph the Railway avers that the plaintiff, Claiborne-Annapolis Ferry Company, is without legal right to question in this suit the corporate or charter powers of the defendant Railway to establish and operate a ferry as aforesaid.

10. Answering paragraph 10, the Railway admits the allegations therein contained, except that it denies that it has yet proceeded with the construction and operation of said ferry business; and except further that it denies that the said ferry business is or will be independent of its said railroad as aforesaid.

11. Answering paragraph 11, the Railway denies the facts contained therein and specifically denies that irreparable injury or legal injury of any kind will result to the plaintiff if the said order of the Commission of August 1, 1930 is not enjoined and set aside as prayed for by the plaintiff. The Railway further alleges that the plaintiff, Claiborne-Annapolis Ferry Company, is without legal right to maintain this suit for the reason that no right of the said plaintiff has been violated by the order of the In-

terstate Commerce Commission, complained of in said bill, since said plaintiff has no vested right to a monopoly of all of the ferry business on Chesapeake Bay, but has only a privilege to operate a ferry between certain points on such Bay, other than the points between which the defendant, Chesapeake Beach Railway Company, has heretofore been granted a certificate of public convenience and necessity for the operation of a ferry, by the defendant Commission, pursuant to section 1 (18) to (20) of the Interstate Commerce Act, 41 Stat. 476.

[fol. 19] 12. Further answering the bill the Railway, except as hereinafter expressly admitted, denies the truth of each and all the allegations contained in said bill in so far as they conflict either with the allegations in this answer or with the statements of fact set out in said report and order of the Commission, which is attached hereto and made a part hereof.

All of which matters and things the defendant Railway is ready to aver, maintain and prove, as this Honorable Court shall direct, and hereby prays that said bill of complaint be dismissed.

Chesapeake Beach Railway Company, by Eugene Fox, Executive Vice-President. (Corporate Seal.)
Olcott, Holmes, Glass, Paul & Havens, Jonathan C. Gibson, Shoreham Building, Washington, D. C., Attorneys for the Defendant Chesapeake Beach Railway Company.

[fol. 20] *Duly sworn to by Eugene Fox. Jurat omitted in printing.*

[fol. 21] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION TO DISMISS AND ANSWER OF THE ABOVE-NAMED FRANK MCMANAMY, BALTHASAR H. MEYER, CLYDE B. AITCHISON, JOSEPH B. EASTMAN, ERNEST I. LEWIS, EZRA BRAINERD, JR., CLAUDE R. PORTER, PATRICK J. FARRELL, HUGH M. TATE, WILLIAM E. LEE, AND C. D. MAHAFFIE, INDIVIDUALLY AND AS MEMBERS OF THE INTERSTATE COMMERCE COMMISSION—Filed February 2, 1931

Motion to Dismiss

Come now Frank McManamy, Balthasar H. Meyer, Clyde B. Aitchison, Joseph B. Eastman, Ernest I. Lewis, Ezra Brainerd, Jr., Claude R. Porter, Patrick J. Farrell, Hugh M. Tate, William E. Lee and C. D. Mahaffie, individually and as members of the Interstate Commerce Commission, and move that the court dismiss the bill of complaint filed herein as against said defendants, and as grounds of said motion say:

1. On its face the bill of complaint shows that this is a suit to enjoin, set aside, and annul a certain order of the Interstate Commerce Commission in said bill of complaint described, which as exclusive jurisdiction over such cases is conferred by the Urgent Deficiencies Act of October 22, [fol. 22] 1913, Chapter 32, 38 Stat. 219, upon the several District Courts of the United States, and no such jurisdiction is conferred upon the Supreme Court of the District of Columbia.

2. That the United States has not been made a party to this suit, whereas, under the law, all cases brought to enjoin, set aside, annul or suspend orders of the Interstate Commerce Commission are required to be brought against the United States.

3. That it does not appear from the bill of complaint that the plaintiff has any legal standing to bring suit to set aside the order of the Interstate Commerce Commission described in said bill of complaint.

4. That the bill of complaint is without equity upon its face and does not state any cause of action in equity or otherwise against the Interstate Commerce Commission or its members.

5. That the bill of complaint does not contain either statements or allegations of fact which show that the said order of the Interstate Commerce Commission causes, or will cause, plaintiff to suffer such legal damage as would entitle it to the injunctive relief prayed in said bill of complaint.

6. On its face the bill of complaint shows that in the doing of the matters and things alleged in the bill of com-

plaint herein these defendants acted, not individually, but as members of the Interstate Commerce Commission in their official capacity; wherefore these defendants pray that the case be dismissed against them as individuals.

Answer

Come now Frank McManamy, Balthasar H. Meyer, Clyde B. Aitchison, Joseph B. Eastman, Ernest I. Lewis, Ezra Brainerd, Jr., Claude R. Porter, Patrick J. Farrell, Hugh M. Tate, William E. Lee and C. D. Mahaffie, individually and as members of the Interstate Commerce Commission (hereinafter called the Commission), defendants in [fol. 23] the above-entitled suit, now and at all times hereafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the bill of complaint contained, for answer thereunto, or unto so much, or such parts thereof as they are advised that it is material for them to answer, answer and say:

1. Answering the opening paragraph and paragraphs 1, 2 and 3 of the bill of complaint, these defendants admit the truth of the allegations therein contained.

2. Answering paragraph 4 of the bill of complaint, these defendants admit that this is a case brought to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission, but they deny that the statutes referred to in said paragraph of the bill of complaint confer jurisdiction of such suit upon the Supreme Court of the District of Columbia, deny that said Supreme Court of the District of Columbia has jurisdiction of this suit, and deny that this suit is brought pursuant to said statutes.

3. Answering paragraphs 5 and 6 of the bill of complaint, these defendants admit the truth of the allegations therein contained, except that these defendants say that they have no knowledge as to whether or not the Chesapeake Beach Railway Company, defendant herein, has any other charter authority to operate ferry service than as stated in said paragraph 6 of the bill of complaint.

4. Answering paragraphs 7, 8, 9, 10 and 11 of the bill of complaint, these defendants admit and allege that on or about December 26, 1929, the defendant, pursuant to the

provisions of paragraphs (18) to (21), inclusive, of Section 1 of the Interstate Commerce Act, filed its application [fol. 24] to the Interstate Commerce Commission for a certificate of public convenience and necessity for the extension of its line of railroad by the establishment and operation of a ferry for the transportation of passengers and property between Chesapeake Beach in Calvert County, Md., on the western shore of Chesapeake Bay, to a point on Trippe's Bay in Dorchester County, Md., on the eastern shore of Chesapeake Bay; that said application was designated upon the records of the Interstate Commerce Commission as Finance Docket No. 8013, Chesapeake Beach Railway Company Ferry; these defendants further admit and allege that in said proceeding, so instituted as above set forth, Division 4 of the Commission (which division then consisted of defendants Balthasar H. Meyer, Joseph B. Eastman and Thomas F. Woodlock, the last named being no longer a member of the Commission), on or about August 1, 1930, made a report and caused the certificate of the Commission to issue thereunder as prayed in the application above mentioned, copies of which report and certificate are attached to and made a part of this answer as Exhibit A thereto, and that said report and certificate are published at 166 I. C. C. 293; that the plaintiff herein was a party to said proceeding having been permitted by said Division 4 of the Commission to intervene and participate in said proceeding in opposition to the granting of said certificate; that these defendants refer the court to the text of said report and certificate (Exhibit A to this answer) for full, complete and accurate information concerning the contents thereof and for a description of the proceedings before the Commission upon which the report and certificate were and are based; that at hearings in said proceeding a large volume of testimony and other evidence bearing upon the matters covered by said [fol. 25] report and certificate was submitted to said Division 4 of the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiff herein by its counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to said Division 4 of the Commission for determination, whereupon the Commission, acting by and through said Division 4, decided and determined said mat-

ters and entered and served upon all parties to said proceeding the aforesaid report and certificate; that said report and certificate include all the Commission's findings of fact which are required by law and the Commission's decisions and conclusions in the premises, and that, upon the evidence aforesaid, the Commission made the findings and stated the conclusions upon which said certificate is based.

These defendants further allege that the conclusions and order of the Commission were and are, and that each of them was and is fully supported and justified by the evidence submitted to in the proceeding aforesaid.

These defendants further allege that in making said report Division 4 of the Commission considered and weighed carefully in the light of the knowledge and experience of its members, each fact, circumstance, and condition called to its attention on behalf of the parties in said proceeding by their respective counsel, including all the matters covered by the allegations of the bill of complaint herein.

These defendants further allege that said certificate was not made or entered by the Commission either arbitrarily [fol. 26] or unjustly, or contrary to the relevant evidence or without evidence to support it; that in making said certificate the Commission did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and these defendants deny the truth of each of and all the allegations to the contrary contained in said bill of complaint.

Further answering paragraph 9 of the said bill of complaint, these defendants deny the truth of all the allegations therein contained except the allegation contained in subdivision (c) of said paragraph 9, relative to the scope of the charter powers of defendant, Chesapeake Beach Railway Company, which paragraph and the allegations thereof these defendants say are irrelevant and impertinent to the issues of this case and to the issues which may legally be presented to a court in a proceeding brought to enjoin, set aside, annul or suspend an order of the Interstate Commerce Commission, but as to said allegation, if it is material for these defendants to answer, they deny the truth thereof.

Further answering paragraph 10 of said bill of complaint these defendants say that they have no knowledge of the

matters and things in said paragraph alleged, and that, therefore, they neither admit nor deny the truth of said allegations.

Further answering paragraph 11 of said bill of complaint these defendants deny that the plaintiff will suffer permanent or irreparable damage or injury, and denies that the plaintiff will suffer any legal injury in the premises.

Except as herein expressly admitted, these defendants deny the truth of each of and all the allegations contained [fol. 27] in said bill of complaint in so far as they conflict either with the allegations herein or with the statements or conclusion of facts in said report and certificate of the Commission, which are hereby referred to and made a part hereof.

All of which matters and things these defendants are ready to aver, maintain and prove as this Honorable Court shall direct and hereby pray that said bill of complaint be dismissed.

Frank McManamy, Balthasar H. Meyer, Clyde B. Aitchison, Joseph B. Eastman, Ernest I. Lewis, Ezra Brainerd, Jr., Claude R. Porter, Patrick J. Farrell, Hugh M. Tate, William E. Lee, and C. D. Mahaffie, by Nelson Thomas, Attorney. Daniel W. Knowlton, Chief Counsel, of Counsel.

[fol. 28] *Duly sworn to by Ezra Brainerd, Jr. Jurat omitted in printing.*

[fol. 29] EXHIBIT "A" TO ANSWER

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 8013

CHESAPEAKE BEACH RAILWAY COMPANY FERRY

Submitted July 24, 1930. Decided August 1, 1930

Certificate issued authorizing the Chesapeake Beach Railway Company to establish ferry service across Chesapeake Bay between Chesapeake Beach and a point on Trippe's Bay, near Hudson, in Calvert and Dorchester Counties, Md.

George E. Holmes and Harry C. Ames for applicant.

Philip B. Perlman for Claiborne-Annapolis Ferry Company, intervener.

Report of the Commission

Division 4, Commissioners Meyer, Eastman, and Woodlock

By Division 4:

Exceptions were filed by the intervener to the report proposed by the examiner.

The Chesapeake Beach Railway Company, a carrier by railroad subject to the interstate commerce act, on December 26, 1929, filed an application under section 1 (18) of the act for a certificate that the present and future public convenience and necessity require the extension of its existing line of railroad by establishing and operating a ferry across Chesapeake Bay between the eastern terminus of the line at Chesapeake Beach to a point on what is known as the Thomas J. Seward farm on Trippe's Bay, about 10 miles west of, and on the State highway leading to, the town of Cambridge, a distance of 16 miles, in Calvert and Dorchester Counties, Md. A hearing has been had. The Claiborne-Annapolis Ferry Company, which operates in ferry service across Chesapeake Bay between Annapolis and Claiborne, Md., intervened in opposition to the applicant's proposal. The Public Service Commission of Maryland has advised that it does not desire to make any representations in this proceeding.

By charter obtained from the State of Maryand in September, 1891, the Washington & Chesapeake Beach Railway Company was authorized to construct and operate a line of railroad from a point in the District of Columbia in a southeasterly direction to certain points on Chesapeake Bay and to operate vessels to connect the railroad with other points by water. Prior to completion of the line, this company defaulted in the performance of its obli- [fol. 30] gations with respect to $1,000,000 of first-mortgage bonds and its properties were sold in foreclosure proceedings. On March 7, 1896, title to the property, rights, and franchises theretofore belonging to the old company were acquired by the applicant.

The applicant's railroad extends from Chesapeake Junction, D. C., through Marlboro, Pennsylvania Junction, and Owings, to Chesapeake Beach, Md., 29.04 miles. Connec-

tion is made at Chesapeake Junction with a line of the Baltimore & Ohio Railroad Company and at Pennsylvania Junction with a line of the Pennsylvania Railroad Company. Freight is regularly handled in interchange with those carriers.

It is stated that the applicant's line has never been a paying investment. The company is now in default in the payment of the principal and interest of $1,000,000 of first-mortgage bonds which matured July 1, 1923. All these bonds, all the applicant's outstanding capital stock, and certain liens and claims against the property are now owned by one William V. Hodges, as trustee for a number of equitable interests.

Income statements submitted in the record show that in each of the years from 1924 to 1928, inclusive, operating deficits ranging from $4,077.09 to $18,253.12 were sustained. In June, 1929, the company came under new management. As a result of economies effected during the latter part of the year, it earned net railway operating income amounting to $7,439.59. The principal savings, aggregating $20,320.46, were in reduced expenditures for maintenance. A witness for the applicant testified to the effect that the savings were not accomplished at the expense of proper maintenance, contending that the properties previously were overmaintained.

During the same 6-year period, revenues earned by the applicant were divided as to principal sources, as follows:

Year	Revenues [1]		Year	Revenues [1]	
	Passenger	Freight		Passenger	Freight
1924	$103,982	$34,409	1927	$73,655	$37,020
1925	97,118	37,578	1928	68,451	49,171
1926	80,258	40,334	1929	60,679	57,467

[1] Cents omitted.

As indicated by these statistics, the applicant derives most of its revenues from passenger traffic. In recent years revenues from this source have steadily declined owing to increasing motor-vehicle competition over improved highways. The fact that the freight traffic has shown an upward tendency is attributed to growth, in population and business activities, of communities served by the line.

[fol. 31] The origin of the present proposal is referred to below. There is testimony to the effect that after a careful survey of the situation, the applicant determined that the addition of ferry service will be a profitable enterprise which would enable the applicant to earn its way and at the same time provide needed service.

Plans for the proposed ferry contemplate the purchase of two new automobile-and-passenger ferryboats designed to carry 95 vehicles and 1,800 passengers. Each of these vessels is to be equipped with two 1,200-horsepower marine-type Diesel engines. Terminal facilities at Chesapeake Beach are to be provided by the construction into Chesapeake Bay of a causeway 1,250 feet long and 50 feet in width, further extended 750 feet by an open wharf 40 feet wide. Similar construction will be required at the eastern terminus on Trippe's Bay. Approach to the piers will be through channels 12 feet deep. Permits requisite to the performance of such work in navigable waters have been obtained from appropriate public authority.

The cost of the project is estimated to be as follows: Two vessels at $350,000 each, $700,000, and construction of terminals, including an allowance for maintenance dredging of the eastern channel for a year or two, if necessary, $385,442; total, $1,085,442. To provide the necessary funds the applicant contemplates issuing $750,000 of new first-mortgage bonds and $525,000 of equipment-trust certificates. Hodges has agreed to accept $600,000 of second-mortgage bonds in full satisfaction of amounts due on account of the principal and interest of the outstanding bonds. If authorized, construction work would begin promptly and be completed by May 1, 1931.

The territory between the east shore of Chesapeake Bay and the Atlantic Ocean, sometimes referred to as the Del-Mar-Va peninsula, sometimes as the Eastern Shore, includes 11 counties of the States of Maryland and Virginia. With reference to the Choptank River, the estuary of which forms an arm of the bay slightly north of the latitude of Cambridge, five Maryland counties (Cecil, Kent, Queen Anne's, Talbot, and Caroline) lie to the north, and four Maryland counties (Dorchester, Wicomico, Somerset, and Worcester) and two Virginia counties (Accomac and Northampton) lie to the south. The six counties last mentioned, hereinafter

referred to as the lower Eastern Shore, aggregate 4,135 square miles in area and have a total population estimated at 248,294. In general the Eastern Shore is a fertile agricultural section from which products of farm and orchard are marketed in relatively near-by metropolitan areas.

The principal shipping and jobbing centers of the lower Eastern Shore are Accomac, Crisfield, Pocomoke, Princess [fol. 32] Anne, Cambridge, and Salisbury. These towns suffer disadvantage from circuitous routes to natural markets and trading centers at Baltimore, Washington, and points west. This situation arises from the fact that the intervener's ferry provides the southernmost means of crossing the bay available to traffic between the lower Eastern Shore and the cities mentioned. Cambridge, focal point of highways traversing the territory south of the Choptank, is 47.5 miles from Claiborne by highway. Compared with existing routes via Claiborne and Annapolis, the more southerly ferry proposed by the applicant would effect the following reductions in distances to markets from 13 representative points on the lower Eastern Shore, including the towns previously mentioned and the seaside resort of Ocean City, in Worcester county:

From—	To Washington		To Baltimore Miles
	Route A [1] Miles	Route B [2] Miles	
Salisbury and 11 other points	24	30	6
Cambridge	36	42	18

[1] Route A, highway, via Cambridge, to Trippe's Bay; ferry to Chesapeake Beach; highway beyond.

[2] Route B, highway, via Cambridge, to Trippe's Bay; ferry to Chesapeake Beach; applicant's line beyond.

All-high-way routes via Elkton, Md., around the head of the Bay, involve out-of-line hauls which increase the distances, as compared with the existing ferry route, from Salisbury and 11 other points to Baltimore by 86 miles and to Washington 122 miles, and from Cambridge to Baltimore, by 65 miles, and to Washington 101 miles. The applicant concedes that to the upper five counties distances would be greater by its ferry than by that of the intervener.

The distance from Claiborne to Annapolis via the intervener's route is about 19 miles, requiring a trip of about 1.5 hours. Between the termini of the proposed ferry the distance across the Bay is 15.75 miles. The applicant intends

to cover this distance in one hour. Its ability to do so is doubted by the intervener. Having regard to seasonal variation in traffic between the affected territories, the service contemplated by the applicant is six round trips daily between May 1 and October 15 and four round trips daily between October 16 and April 30. It is contended that this service would "evolve" a system of transportation for expeditious handling of motor vehicles and persons traveling by motor vehicle in new routes shorter than now available between points on the lower Eastern Shore and points on the mainland. This is the assigned primary purpose of the proposal.

[fol. 33] Traffic expected to use the proposed ferry may be grouped according to classes, as follows:

1. Private automobiles and motor busses transporting (*a*) tourist visitors and residents of the National Capital to and from Ocean City and other points on the Eastern Shore, (*b*) Eastern Shore patrons of an amusement park being developed at Chesapeake Beach by the Chesapeake Beach Hotel Company, and (*c*) persons traveling from one shore of the bay to the other in ordinary commercial and social communications.

2. Motor trucks transporting fresh vegetables and fruits and seafood products from points of origin on the Eastern Shore to markets at Washington, and possibly Baltimore.

3. Motor trucks used by west-shore jobbers in distributing various commodities to dealers on the Eastern Shore.

4. Persons, in addition to the drivers, occupying passenger vehicles listed above, persons traveling on through tickets between Chesapeake Junction and a station proposed to be established on the Eastern Shore at or near Hudson, and west-shore visitors to the amusement park who may be attracted by a voyage on the waters of the bay.

5. Package freight moving from points in C. F. A. or trunk-line territory to the station at Hudson.

The problem of estimating the volume of traffic which may use the ferry has been approached by the applicant in two ways:

1. The first estimate is derived from highway-traffic statistics developed by the Maryland State Roads Commission

through 12-hour counts at various points on an average of one day a month. The count at Claiborne indicates that from October 1, 1928, to September 30, 1929, the number of vehicles moving to and from that point averaged 780 per day. Inasmuch as there is no town of commercial importance within 15 miles of Claiborne, it has been assumed that all this traffic moved to and from the intervener's ferry or to meet the bus lines which operate at either terminal. It was further assumed that, of the daily traffic observed at Claiborne, at least 250 vehicles, or approximately 32 per cent had origin or destination south of the Choptank, since this section has the more important towns from the standpoint of agricultural production, and also the town of Ocean City, the only ocean resort in the State of Maryland. Most of the transbay traffic to and from the lower Eastern Shore uses the intervener's ferry.

Upon the foregoing assumptions, and an assumed normal increase of 10 per cent annually, the following estimates of [fol. 34] traffic which may be expected to use the proposed ferry has been computed and submitted in the record.

	First year	Second year	Third year	Fourth year	Fifth year
Daily average:					
Vehicles	250	275	302	332	365
Passengers[1]	500	550	605	665	731
Annual total:					
Vehicles[2]	91,250	100,375	110,230	121,180	133,225
Passengers	182,500	200,750	220,825	242,725	266,815

[1] Two persons per vehicle in addition to driver.

[2] According to State road commission statistics, highway traffic on the Eastern Shore increased 57 per cent in the period from January 1, 1926, to September 30, 1929.

This estimate does not take into account new business expected to be created by shorter routes via the proposed ferry.

2. In the second estimate the applicant's calculations are based on assumed use of the vessels in varying degrees, according to variations in the volume of highway traffic on account of seasons, week ends, Sundays, and holidays, with the following result:

Periods	Capacity of vessels [1]	Assumed use	Estimated traffic: Number of vehicles	Estimated traffic: Number of passengers
May 1—October 15: [2]				
Sundays and holidays (27)	29,160	[3] 75	21,770	43,540
Saturdays (24)	25,920	[3] 50	12,960	25,920
Other week days (117)	126,300	[3] 25	31,590	63,180
Total			66,320	132,640
October 16-April 30: [4]				
Sundays (28)		[3] 25	5,040	10,080
Week days (169)		[3] 15	20,380	40,760
Total			25,420	50,840
Total (12 months)			91,740	183,480
First estimate, first year			91,250	182,500

[1] At 90 vehicles per trip.
[2] 12 single trips per day.
[3] Percentage of capacity.
[4] 8 single trips per day.
[5] Vehicles per trip.

No estimate has been furnished as to package freight. The applicant expects that operation of the ferry would tend to increase the traffic over its railroad.

The intervener challenges the soundness of the applicant's estimates. Counsel pertinently points out that the number of vehicles actually crossing the bay to and from Claiborne in 1929 averaged but 209 per day, indicating that over 73 per cent of the vehicles observed at Claiborne were not bound in transbay movement. Although doubting that it would be possible for the applicant to obtain 32 per cent of the traffic now carried by the intervener, he maintains [fol. 35] that even if that ratio were applied to the actual ferry traffic the result would be only 24,432 vehicles, or 51,920 less than included in the estimate of traffic for the first year of operation. The applicant did not undertake to establish the existence of any definite relationship between the carrying capacity of ferry boats and the use of such facilities. It would seem that such a relationship scarcely can be determined in advance of experience. The testimony for the applicant is that the estimates represent its best judgment in the matter and are considered to be conservative, and that the proposed ferry will tend to develop new traffic which does not now move to the Eastern Shore because of the lack of adequate facilities for crossing the bay.

Estimates of prospective revenues are based on average charges of $3 per vehicle including driver, and 50 cents per passenger transported by ferry. Estimates of operating expense include items usually involved in vessel navigation, with the exception of depreciation. This item was omitted because the project is to be begun with new equipment and appurtenances. Presumably the applicant will comply, in its accounting, with applicable provisions of the classifications prescribed by us.

Theoretical income statements giving effect to the applicant's estimates of earnings from ferry traffic and increased traffic on its line of railroad are summarized below:

	First year	Second year	Third year	Fourth year	Fifth year
Railroad operations:					
Operation revenues..	$160,000	$172,000	$177,000	$183,000	$188,000
Operating expenses..	119,000	119,000	119,000	119,000	119,000
Net revenue from railway operations	41,000	53,000	58,000	64,000	69,000
Other deductions....	9,800	10,800	10,800	10,800	11,800
Net railway operating income.....	31,200	42,200	47,200	53,200	57,200
Ferry operations:					
Operating revenues..	365,000	401,500	441,102	484,902	533,082
Operating expenses..	103,567	103,567	103,567	103,567	103,567
Net operating revenue	261,433	297,933	337,535	381,335	429,515
Fixed charges[1].....	129,000	125,850	122,700	119,500	116,400
Other deductions....	15,000	15,000	15,000	15,000	15,000
Net operating revenue	117,433	157,083	199,835	246,785	298,115

[1] Interest on first-mortgage bonds and interest and amortization of principal of equipment-trust certificates. Apparently the second-mortgage bonds would be income bonds.

Combining the estimated results of operation of railroad and ferry, the applicant expects to earn, during the first five years of dual operation, net income increasing from $148,633 in 1931 to $355,315 in 1935.

In order to earn operating expenses, insurance premiums, taxes, and fixed charges (footnote 1, supra), it would be necessary that the vessels transport annually in the neighborhood of 62,000 vehicles and 124,000 passengers. [fol. 36] or a daily average of about 170 vehicles and 340 passengers. If this average could be approximated dur-

ing the off season, October 16 to April 30, the applicant's optimism would appear to be amply justified, because greater inducements to use the ferry in the summer vacation and producing seasons naturally could be expected to result in much heavier traffic during that portion of the year. Such information as is presented with respect to the fundamental economics of the situation appears in the testimony of witnesses representing the shipping and traveling interests actually or potentially concerned.

A representative of a Washington commercial organization expressed the belief that the applicant's traffic estimates are moderate. He testified that a survey of larger and more prominent hotels alone showed that 1,800,000 tourists visited the National Capital in 1925. On the same basis, the number of visitors is now estimated at 2,000,000 per year. Allowing for numerous accommodations of various classes not included in the survey, the witness thinks that 5,000,000 tourists visited Washington in 1929. According to this witness, the city has 600 industrial plants producing manufactured products valued at $100,000,000 annually. He contends that these industries are handicapped by existing facilities for transportation to the east and west, shippers depending mainly on the highways, and that the Eastern Shore, one of the richest agricultural territories within reasonable distance, is cut off except through some such means of transportation as proposed by the applicant. He expressed the opinion that the proposed ferry would be of great advantage to the people both of the District of Columbia and of the Eastern Shore.

Washington business men testified that the proposed ferry would open up relations with the Eastern Shore by enabling quicker and less expensive movement of agricultural products, quicker travel to and from Ocean City, and more advantageous solicitation and distribution from Washington of manufactured products marketed on the Eastern Shore.

A representative of a Washington commission house, dealing in fresh fruits and vegetables on consignment, testified to the effect that between April 15 and the middle or end of July this concern receives as high as 10 or 12 truck loads of produce per day and that the daily receipts average from 2.5 to 3 tons. The trucks move by ferry from Claiborne to Annapolis. The movement is sometimes de-

layed by overtaxing of the intervener's ferry facilities. As a consequence the market is missed and the shipments deteriorate, with resultant loss to the farmers. While the record does not afford any idea of the gross movement of Eastern Shore perishables to Washington, the witness thinks it is of sufficient volume to warrant another ferry. [fol. 37]. The applicant would adjust its ferry schedule to meet the requirements of this traffic with respect to time of delivery at Washington.

As to the tourist traffic it is stated that the Eastern Shore is of great interest to Washington residents and visitors. Many people, especially tourists from inland points, desire to reach watering places. Important considerations in the choice of routes and destinations are the time required for travel and facilities available for crossing water barriers encountered en route. Under present conditions, it is said, Atlantic City, N. J., and Virginia Beach, Va., are practically as accessible as Ocean City. Contributing to this situation are the assigned reasons that the Defense Highway, from Washington to Annapolis, is narrow and congested; that existing facilities for crossing the bay from Annapolis are inadequate on holidays and week-ends; and that the movement through Annapolis is retarded by congestion of narrow streets by lines of automobiles waiting admittance to the dock. The distance from Washington to Chesapeake Beach by highway now under construction will be from 4 to 6 miles less than the highway distance from Washington to Annapolis. By rail the distance from Washington to Chesapeake Beach is said to be considerably less than from Washington to Annapolis. Comparisons of schedules do not appear.

It was testified that many points of historic interest on the Eastern Shore are omitted from itineraries of tourists on account of limited ferry facilities and the time consumed in crossing Chesapeake Bay. A saving of half an hour in time is said to be the equivalent of 20 miles travel on land. An expert of automobile traffic expressed the view that the Eastern Shore needs better ferry facilities and stated that, with the establishment of the proposed ferry, travel across Chesapeake Bay would be doubled in two years. The interest of travelers in the attractions of the Eastern Shore would be stimulated by improved ferry service, somewhat more intensive advertising, and advice furnished at automobile information bureaus.

Cambridge is served by a subordinate line of the Pennsylvania system. The proposed ferry would put Cambridge on a direct line of travel between the lower Eastern Shore and the cities of Baltimore and Washington. Via the applicant's ferry, it is said, residents of Cambridge would be able to journey to Washington and return in the time now required to reach the city via Claiborne.

By highway, Ocean City is 98 miles from Claiborne and 62 miles from Cambridge. As compared with 133 miles via Claiborne, the distance from Washington to Ocean City via the proposed ferry and Cambridge would be 111 miles, a difference of 22 miles. There is no direct rail connection between Cambridge and Ocean City. It is stated that the [fol. 38] latter point is difficult of access from Washington except by automobile. A Washington witness thinks the time of travel to Ocean City would be reduced one-half through the improvement in ferry service and the decrease in mileage which the applicant's ferry would make possible. It is believed that Ocean City would derive material benefit from a substantial increase in the tourist traffic attracted to the community by reason of its proximity to the sea.

Because present facilities are considered unsatisfactory, many shippers of Wicomico and Somerset Counties often move their products to Washington over the circuitous all-highway route via Elkton. It was testified that these producers market a great deal of perishable commodities in Washington. The producing section is said to be growing and better ferry service would be of great advantage to the growers and merchants of the lower Eastern Shore, especially in providing more direct access to Washington. A resident of Salisbury believes that the traffic between the two shores of the bay is increasing to such an extent as to justify additional ferry service. The proposed ferry would be especially convenient in intercourse between the east and west shores of lower Maryland. The distance between Cambridge and Prince Frederick, in Calvert County, 14 miles from Chesapeake Beach and about the same distance from Owings, nearest station on the applicant's line, would be reduced 50 miles.

The matter of better facilities for crossing Chesapeake Bay has been a matter of lively interest in the lower Eastern Shore for a number of years owing to growing dissatisfaction with available outlets for the products of the

territory. About two years ago interested parties organized a corporation for the purpose of establishing ferry service between Cooks Point, at the mouth of the Choptank, and Chesapeake Beach. Application for a certificate of convenience and necessity was made to the State Commission but action thereon has been indefinitely deferred for want of a proper plan of finance. Subsequently the promoters of the project requested the applicant to interest itself in the matter of ferry service, and out of this appeal the present proposal eventually developed.

In recognition of the fact that the time required for crossing the bay between Annapolis and Claiborne is unduly long, the intervener is establishing at a point on Kent Island, directly opposite Annapolis, a new eastern terminal estimated to cost between $150,000 and $160,000. At the time of the hearing it was expected that ferry service between Annapolis and the new terminal would begin by May 15, 1930. The distance across the bay via this route [fol. 39] would be about 6.5 miles. The time required for a single trip is estimated from 25 to 35 minutes. During the present summer trips are to be made hourly. Half-hourly service will be provided during the summer of 1931. The carrying capacity of the vessels will be doubled through more frequent operation via the shorter route. It appears that the new terminal will be farther north than Claiborne, involving from 15 to 20 miles additional travel to and from the lower Eastern Shore.

Counsel for the intervener contends that the record does not justify the applicant's claims of necessity for the proposed ferry service. He concedes that the ferry would be of special convenience to a relatively small number of people residing in the vicinity of Chesapeake Beach and in territory adjoining Cambridge; but, it is argued, with the inauguration of the intervener's Annapolis-Kent Island service, the time of crossing the bay will be so shortened that the proposed ferry would effect little saving in time. On the contrary, it would take more time to reach almost any point on the Eastern Shore, except Cambridge and vicinity, by that route, if the calculated average speed of motor vehicles, 40 miles per hour, be correct. It is urged that the applicant's ferry would be of no convenience to persons traveling between Washington or Baltimore and

points north of the Choptank, which can be reached more quickly by either of the intervener's routes.

Further, it is maintained, there is not sufficient traffic, at present or in prospect, to support two ferries, whence the intervener apprehends that the applicant could derive no benefit from ferry operation and the intervener's ability to furnish adequate service might be limited. It was testified that the loss of 50 per cent of the traffic now obtained would necessitate material curtailment of present service. In support of these contentions the intervener cites financial difficulties heretofore experienced by it and by other carriers operating in ferry service across the northern reaches of Chesapeake Bay.

The intervener's witness testified that Easton, 17 miles southeast of Claiborne, is the gateway through which the present ferry traffic moves, and that the territory in which the traffice originates or is destined embraces seven of the nine Maryland counties on the Eastern Shore. He states that the four northern counties are directly tributary to the Clairborne ferry and thinks that any convenience of the applicant's ferry to the lower Eastern Shore would be offset by inconvenience to the upper counties, if the intervener were compelled to cease operation. He believes, also, that the difference in distance from Cambridge to Kent Island, as compared with Claiborne, would be [fol. 40] compensated by the shorter water trip via the new route.

During 1929, the total carrying capacity offered by the intervener, on the basis of trips actually made, aggregated 216,443 vehicles and 3,570,600 passengers. The ferries carried that year 76,352 vehicles and 260,950 passengers, or about 35 per cent of capacity as to vehicles and 7 per cent as to passengers. The witness observed that operating expenses are substantially the same whether the vessels move loaded or empty. He testified that there is little prospect of a material increase in the population of the Eastern Shore and states that new business can not be created because it is not there. He concedes that improvement in communication with the mainland is an issue of recurrent interest on the Eastern Shore.

The intervener has paid but one dividend ($15,000) since 1916. This seems partly attributable to reinvestment of earnings in physical improvement of the carrier's prop-

erties. The wisdom of replacing unsuitable equipment with vessels of modern design and capacity is reflected in the intervener's subsequent experience as to traffic and revenues. Two new vessels now in operation were acquired in 1926 and 1929, respectively.

The intervener carries little freight except as moving in motor trucks. The following tabulation shows an analysis of revenues earned during the past six years:

	1924	1925	1926	1927	1928	1929
Passengers	$77,697	$87,394	$94,045	$114,374	$124,707	$143,003
Vehicles	78,241	96,491	113,860	138,341	160,206	189,630
Freight	.....	190	318	201	.....	.....

Annual reports of the intervener to the State commission show the following results of operation: 1922, operating deficit, $1,475.36; 1923, operating deficit, $3,309.37; 1924, surplus from operation, $16,145.15; 1925, surplus from operation, $11,908.78; 1926, surplus from operation, $6,759.91; 1927, net income, $61,284.22; 1928, net income, $130,550.59; and 1929, net income, $125,869.59. At the end of 1929, the intervener's surplus amounted to $243,384.10, as compared with a corporate deficit of $216,058.15 on December 31, 1922.

It is concluded from the record that, assuming that both the Annapolis ferry and the proposed ferry may survive, the applicant's proposal herein will be in the public interest. Failure of the project would result in no worse transportation conditions than now obtain unless, perchance, the intervener's ability to perform service meanwhile were seriously impaired. The time within which a volume of traffic sufficient to support the new venture may [fol. 41] materialize is problematical, but it would seem that there is at least the possibility that a remunerative traffic eventually may be developed. A more desirable situation would exist if the experiment were to be undertaken by a stronger carrier. Proper precaution in the premises indicates the necessity for the adoption of a conservative financial plan under which fixed charges will be held to the minimum. Under the provisions of section 20a of the interstate commerce act, any issue of securities by the applicant will be subject to prior authorization by us.

As to possible effect of competition by the proposed ferry, the intervener seems unduly alarmed. With more efficient equipment now in use and operation over the

shorter route, permitting service more frequent than the applicant contemplates or, indeed, would be able to furnish without additional vessels, the intervener should be able to retain all traffic which normally should flow to its ferry. A considerable part of the traffic expected by the applicant would not use the intervener's facilities in any case. The intervener has attained a position of strength through regard for the needs and convenience of the public. Continued prosperity of that carrier should be assured by adherence to that policy, because frequent service would afford an effective weapon in any competition which the applicant's ferry might offer.

On exceptions brief counsel for the intervener contends (1) that we are not authorized by law to issue a certificate of public convenience and necessity for the establishment of a general ferry service from point to point within a State; and (2) that the applicant has no authority, under the provisions of its charter, to engage in general ferry business. The force of both contentions is denied by the applicant. Upon the facts disclosed in this record, we are of opinion that we have jurisdiction in the premises.

Upon the facts presented, we find that the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company of ferry service across Chesapeake Bay, in Calvert and Dorchester Counties, Md., as set forth in the application.

An appropriate certificate will be entered. Such certificate will provide that it shall take effect and be in force from and after 30 days from its date.

Certificate of Public Convenience and Necessity

Issued August 1, 1930

A hearing and investigation of the matters and things involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, [fol. 42] which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company of ferry service across Chesapeake Bay, in Calvert and Dorchester Coun-

ties, Md., as set forth in the application and said report: Provided, however, and this certificate is issued upon the express condition, that construction work in connection with the establishment of such service shall be commenced on or before January 1, 1931, and that all such construction work shall be completed on or before December 31, 1931.

It is ordered, That the Chesapeake Beach Railway Company shall report to this commission in writing the commencement and completion of such construction work within 15 days after such commencement and completion, respectively.

It is further ordered, That, when filing schedules establishing rates and fares applicable to and in connection with said ferry service, the Chesapeake Beach Railway Company shall in such schedules refer to this certificate by title, date, and docket number.

It is further ordered, That the Chesapeake Beach Railway Company shall report to this commission as required by valuation order No. 24, effective May 15, 1928.

And it is further ordered, That this certificate shall take effect and be in force from and after 30 days from its date.

By the commission, division 4.

George B. McGinty, Secretary. (Seal.)

[fol. 43] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION TO MAKE UNITED STATES A PARTY DEFENDANT—Filed February 6, 1931

Comes now the plaintiff, by its attorneys, and moves for leave to make the United States a party defendant hereto.

Jesse I. Miller, George E. Edelin, Attorneys for Plaintiff, 1518 K Street, N. W.

[fol. 44] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER MAKING UNITED STATES DEFENDANT—Filed February 13, 1931

Upon consideration of the motion of the plaintiff it is, by the Court, this 13'' day of February, 1931,

Ordered that the said motion be and the same is hereby granted and the United States is made a party defendant hereto.

Jesse C. Adkins, Justice.

[fol. 45] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA—Filed February 20, 1931

First Defense

United States, one of the defendants in the above-entitled cause, for its First Defense to the bill of complaint says:

(a) The bill of complaint is without equity on its face and the facts therein alleged are insufficient to constitute a cause of action against the United States.

(b) The plaintiff is without legal or other valid right under the Act invoked by the bill, or under any other law, to maintain this suit against the United States.

(c) The statements and allegations of fact contained in the bill of complaint are insufficient to show that the order of the Interstate Commerce Commission causes or will cause plaintiff to suffer such legal damage as would entitle it to the injunctive relief prayed in the bill of complaint.

Wherefore United States moves to dismiss the bill of complaint and prays that an appropriate order may be entered.

[fol. 46] Second Defense

United States for its Second Defense to the bill of complaint answers and says:

I

United States admits the allegations contained in paragraphs 1 and 2 of the bill of complaint.

II

Answering paragraphs 3 and 4 of the bill of complaint United States admits and alleges that the Act of October 22, 1913, c. 32, 38 Stat. 219, referred to in said paragraph 4, provides that the several District Courts of the United States shall have jurisdiction to enjoin, annul, and set aside orders of the Interstate Commerce Commission; that said Act expressly provides that such suits shall be brought against the United States, and that they shall be heard and determined by three United States Judges, one of whom shall be a Circuit Judge.

III

United States admits for the purposes of this suit the truth of the allegations contained in paragraphs 5 and 6 of the bill of complaint, except that it denies knowledge of the allegation in said paragraph 6 that the charter of the Washington and Chesapeake Beach Railway Company therein referred to was and is the only authority vested in said company to operate a ferry service, and as to that allegation United States neither admits nor denies.

IV

Answering paragraph 7 of the bill of complaint, United States admits and alleges that on December 26, 1929, the Chesapeake Beach Railway Company filed an application [fol. 47] before the Interstate Commerce Commission for a certificate of public convenience and necessity for the extension of its line by establishing and operating a ferry across Chesapeake Bay between the eastern terminus of the line at Chesapeake Beach to a point on Trippe's Bay in Dorchester County, Maryland; that said application was filed pursuant to § 1 (18-21) of the Interstate Commerce Act (41 Stat. L. 476, U. S. C. Tit. 49, § 1 (18-21) to which the Court is respectfully referred for full and complete information concerning the provisions thereof; that the full and complete definition of the term "railroad" contained in § 1 (3) of said Act is as follows:

The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether

owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property.

That upon the filing of said application the Commission held and conducted full and complete hearings at which all parties, including the plaintiff herein, appeared and were accorded full and ample opportunity to be heard and to present such evidence as they desired.

Except as so expressly admitted United States denies each and every allegation made and contained in said paragraph 7, and expressly denies that it appeared in the record of the hearing before the Commission that the present and/or future public convenience and necessity do not require the extension of the railway line of the Chesapeake Beach Railway Company by operation of the ferry in connection therewith.

V

Answering paragraph 8 of the bill of complaint, United States admits and alleges that on August 8, 1930, the Interstate Commerce Commission, pursuant to authority conferred upon it by § 1 (18-21) of said Act, and after the full [fol. 48] hearing described and alleged in the preceding paragraph hereof and upon the testimony and representations submitted by the parties to said hearings, including the plaintiff herein, made and entered its report and order (165 I. C. C. 293) finding that the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company of the ferry service as described in said report, and issued its certificate of public convenience and necessity authorizing and permitting said railway company to proceed with the establishment and operation of said ferry service, which said report and order are annexed to the answer heretofore filed in this cause by the Interstate Commerce Commission and made a part thereof as Exhibit A, and to which the Court is respectfully referred for full and complete information concerning the Commission's findings and conclusions and the permission and authority granted by said order.

Further answering said paragraph 8, United States alleges that the findings and conclusions of the Commission set forth in said report, and the order made and issued thereon authorizing the establishment and operation of said ferry service, are fully supported and justified by the evidence submitted by the parties and contained in the record before the Commission in said proceeding.

VI

United States denies each and every allegation made and contained in paragraph 9 of the bill of complaint, and says that the allegation in subdivision (c) of said paragraph relative to the scope of the charter powers of the Chesapeake Beach Railway Company is irrelevant, incompetent, and immaterial to the issues of this case and to the issues which may be legally presented to the Court in a suit to enjoin, set aside, annul, or suspend an order of the Interstate Commerce Commission, but if said allegation be material, United States denies the truth thereof.

[fol. 49]

VII

United States denies knowledge of the facts of the allegations contained in paragraph 10 of the bill of complaint and as to said allegations it neither admits nor denies.

VIII

Answering paragraph 1 of the bill of complaint United States denies each and every allegation thereof and expressly denies the allegation that plaintiff will suffer permanent and irreparable damage and injury unless the Commission's said order is annulled and enjoined, and further denies that plaintiff will suffer any legal damage or injury as a result of said order.

Except as herein expressly admitted United States denies the truth of each and all the allegations contained in the bill of complaint.

Wherefore, having fully answered the bill of complaint, United States prays that the relief therein sought be denied and that the bill be dismissed at the costs of the plain-

tiff, and that it have such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General. John Lord O'Brian, Assistant to the Attorney General. Leo A. Rover, United States Attorney.

[fol. 50] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

[fol. 51] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

REPLICATION TO ANSWER OF THE INTERSTATE COMMERCE COMMISSION—Filed March 14, 1931

Comes now the plaintiff and for a replication to the answer of the Interstate Commerce Commission, filed herein says:

Referring to paragraph numbered four of the answer of the Interstate Commerce Commission, plaintiff denies that either the conclusion or order of the Commission was or is, and/or that each of them was and/or is, fully, or at all, supported and/or justified by the evidence submitted to it in said proceeding.

Plaintiff avers that said certificate of public convenience and necessity was made and entered by the Commission arbitrarily and unjustly and contrary to the relevant evidence and without evidence to support it; plaintiff avers that in making said certificate the Commission did exceed the authority which had been conferred upon it by law and that it did exercise and assume authority in an unreasonable manner.

Claiborne-Annapolis Ferry Company, by Jesse I. Miller, Philip B. Perlman, Attorneys. Jesse I. Miller, Philip B. Perlman, George E. Edelin, Attys.

[fol. 52] *Duly sworn to by Jesse I. Miller. Jurat omitted in printing.*

[fol. 53] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

REPLICATION TO ANSWER OF UNITED STATES OF AMERICA—Filed March 14, 1931

Comes now the plaintiff and for a replication to the answer of the United States, filed herein says:

It is denied that either the findings or conclusions of the Commission, set forth in its said report, and/or the order made and issued thereon authorizing the establishment and/or operation of said ferry service are fully, or at all, supported and/or justified by the evidence submitted by the parties and/or contained in the record before the Commission in said proceeding.

Claiborne-Annapolis Ferry Company, by Jesse I. Miller, Philip B. Perlman, Attorneys. Jesse I. Miller, Philip B. Perlman, George E. Edelin, Attys.

Duly sworn to by Jesse I. Miller. Jurat omitted in printing.

[fol. 54] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

REPLICATION TO ANSWER OF CHESAPEAKE BEACH RAILWAY COMPANY—Filed March 14, 1931

Comes now the plaintiff and for a replication to the answer of the Chesapeake Beach Railway Company, filed herein says:

Referring to paragraph nine of the answer of the Chesapeake Beach Railway Company, plaintiff says, upon information and belief, that notice of an application of the Chesapeake Beach Railway Company to "extend" its line by a ferry service was given to the Governor of the State of Maryland, and further upon information and belief plaintiff avers that the Public Service Commission of Maryland, acting for and in behalf of said State and Governor, advised the Interstate Commerce Commission that it did not desire to make any representations upon an application of the Chesapeake Beach Railway Company to "extend" its line by a ferry; that thereafter it became apparent to the Public Service Commission of the State of

Maryland, in its aforesaid capacity, that the Chesapeake Beach Railway Company did not desire to "extend" its line by a ferry but, to the contrary, that it did purpose and desire to operate a general ferry not connected with and not to be used by said railroad in connection with its railway line. That thereupon the Public Service Commission of the State of Maryland protested to the Interstate Commerce Commission by a letter bearing date October 14, 1930, [fol. 55] in the words and figures as follows:

Public Service Commission of Maryland

October 14, 1930.

Hon. B. H. Meyer, Interstate Commerce Commission, Washington, D. C.

DEAR SIR: The Public Service Commission of Maryland has received a copy of the brief of the Chesapeake Beach Railway Company in the matter of the proposed extension of its railway line between Washington, D. C. and Chesapeake Beach, Maryland, by the establishment of a ferry connecting with its railway line at Chesapeake Beach, and extending across the Chesapeake Bay to a point on Trippe's Bay in Dorchester County, Maryland.

When you advised this Commission of the application of the Chesapeake Beach Railway Company, the Commission, after receiving an opinion from its General Counsel, Hon. William Cabell Bruce, wrote you that the Commission had no representations to make in the matter.

The brief of the Company, now before me, states:

"Assuming that such a question could have been raised (the authority of the Interstate Commerce Commission to grant a certificate covering a general ferry service in addition to interstate commerce) in the instant case, the State of Maryland has had its day in court, and having advised the Commission that it did not desire to make any representations in this proceeding, there is now an estoppel on the record in respect to any objections which could have been raised by it."

That is not the view of this Commission at all. When this Commission advised you that it had no representations to make in the matter, it had before it an application for the extension of a railway line by the addition of a water connection, for the purposes of the railway's interstate business. This Commission had not then, and has not now,

any representations to make about any extensions, either by land or by water, which the Chesapeake Beach Railway Company may desire to make for interstate business. The opinion of our General Counsel was based on rulings of the courts, and the statute law as to the Company's right to extend its lines, subject to the approval of your Commission, for the carrying on of interstate operations. It did not waive its jurisdiction over commerce orginating and terminating within the state, nor surrender any rights which the [fol. 56] State of Maryland has, under the law or under the decisions of the courts, such as the right and the duty of passing upon an application for the establishment of a general ferry, and the fixing of the rates of such ferry, would be.

If the ferry proposed to be established by the Chesapeake Beach Railway Company is designed to be operated as part of its interstate line, carrying passengers, freight, railway cars or automobiles that form parts of its actual interstate operations as a railway, then this Commission has no representations to make. But if it is proposed to operate a ferry between two points in Maryland and carry passengers, freight and automobiles in an intrastate traffic which has no connection with the interstate business of the Company, then this Commission feels that the Interstate Commerce Commission has no authority to grant permission for such an operation, permission for which, if granted at all, must be obtained from the Public Service Commission of Maryland.

If it is the purpose of the Chesapeake Beach Railway Company to establish a general ferry for the handling of intrastate traffic, under the guise of making an extension of its interstate line, and without submitting its case to this Commission, then the Commission will be compelled to apply to the courts for the protection of its authority and the sovereignty of the state, in this matter.

Very sincerely, —— ——, Chairman.

HEW/MW.

Copy to George R. Holmes, 170 Broadway, N. Y.; Harry C. Ames, Transportation Building, Washington, D. C., Counsel for Chesapeake Beach Railway Co.

It is denied that this plaintiff opposed the granting of the application upon the sole ground that public con-

venience and necessity did not require the establishment of the proposed ferry and/or that the operation thereof by the railway would interfere with and hamper the efforts of the plaintiff to give adequate service on its route; to the [fol. 57] contrary, plaintiff opposed the granting of the application upon the further ground that it was a fact that the Chesapeake Beach Railway Company purposed and desired to operate a general ferry, wholly within the State of Maryland; that the record before the Interstate Commerce Commission conclusively showed that neither public convenience nor necessity required any "extension" of the defendant railway's line by ferry but that, on the contrary, the only public convenience and/or necessity, if any, disclosed by such record, was for the operation of a general ferry, wholly within the State of Maryland not connected with or to be used by said defendant railway in connection with its line; and that the defendant, Interstate Commerce Commission, was without power or authority to authorize the construction and/or operation of such a ferry.

Plaintiff denies that either the findings or conclusions of the Interstate Commerce Commission were or are fully, or at all supported, and/or justified by the evidence submitted to the Interstate Commerce Commission at said proceeding.

Plaintiff further avers that the said order of August 1, 1930, was made and entered by the Commission contrary to the relevant evidence and without evidence to support it; plaintiff further avers that in making said order the Commission did exceed the authority which had been conferred upon it by law and did exercise its assumed authority in an unreasonable manner.

Claiborne-Annapolis Ferry Company, by Jesse I. Miller, Philip B. Perlman, Attorneys. Jesse I. Miller, Philip B. Perlman, George E. Edelin, Attys.

[fol. 58] *Duly sworn to by Jesse I. Miller. Jurat omitted in printing.*

[fol. 59] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION TO SET CASE FOR HEARING—Filed April 17, 1931

Comes now the plaintiff, by its attorneys, and moves to set a day for final hearing hereof before a court consisting

of two Justices of the Supreme Court of the District of Columbia, and one Justice of the Court of Appeals of the District of Columbia.

Jesse I. Miller and George E. Edelin, Attorneys for Plaintiff, 1518 K Street N. W.

We consent:

—— ——, Attorney for Chesapeake Beach Rrl. Co.
—— ——, Attorney for Interstate Comm. Commission. —— ——, Attorney for United States.

[fol. 60] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER FOR HEARING—Filed April 22, 1931

Upon consideration of the motion filed herein on the 17th day of April, 1931, it is, by the court, this 22nd day of April, 1931,

Ordered that this case be and the same is hereby set down for hearing on the 18th day of May, 1931, at 10 o'clock A. M. before Justice D. Lawrence Groner of the Court of Appeals for the District of Columbia and Chief Justice Alfred A. Wheat and Justice Jesse C. Adkins of the Supreme Court of the District of Columbia.

Jennings Bailey, Justice.

[fol. 61] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA, HOLDING AN EQUITY COURT

In Equity. No. 52254

CLAIBORNE-ANNAPOLIS FERRY COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA, CHESAPEAKE BEACH RAILWAY COMPANY, INTERSTATE COMMERCE COMMISSION, et al., Defendants

Suit to Set Aside and Annul the "Certificate of Public Convenience and Necessity" Issued by the Interstate Commerce Commission on August 1, 1930

(Argued May 18, 1931. Decided June —, 1931)

Jesse I. Miller, Philip B. Perlman, and George E. Edelin for plaintiff; George E. Holmes, Jonathan C. Gibson (Olcott,

Holmes, Glass, Paul & Havens on brief), and Elmer B. Collins for defendants.

Before Groner, J. (Court of Appeals), and Wheat, C. J., and Adkins, J. (Supreme Court, D. C.)

MEMORANDUM OPINION OF JUSTICE GRONER—Filed June 6, 1931

GRONER, J.:

Chesapeake Beach Railway Company, which we shall call The Railway, operates a railroad from a point within the District of Columbia to Chesapeake Beach, on the western shore of Chesapeake Bay within the State of Maryland. In 1929, it applied to the Interstate Commerce Commission, under the provisions of Sec. 1, Par. 18, of the Interstate Commerce Act, as amended by the Transportation Act of 1920, Title 49 U. S. C. A., Sec. 1-(18), for a certificate of con- [fol. 62] venience and necessity authorizing the extension of its rail line by the establishment of ferry boats to operate across Chesapeake Bay between Chesapeake Beach and Trippe's Bay. Claiborne-Annapolis Ferry Co., which we shall call The Ferry Co., then and now operating a ferry across Chesapeake Bay between Claiborne and Annapolis, Maryland, intervened in opposition to the grant of the certificate. It denied that the establishment of the proposed ferry was necessary or in the public interest, and charged that the operation of an additional ferry would be detrimental to its service and subversive of its rights. There were the usual hearings before the Commission, and, on August 1, 1930, the certificate issued as prayed. See 166 I. C. C. 293.

This is a suit for injunction (36 Stat. 539). The bill prays that the Commission's certificate be set aside and annulled, and that the Railway Company be prevented from establishing the ferry-extension, on the ground that the record does not contain substantial evidence to support the finding of necessity and convenience, and also because the Commission is without authority under the Act to issue a certificate for the operation of a ferry between points wholly within the State of Maryland, and, lastly, because the proposed operation of the ferry is beyond the powers of The Railway.

We are met at the threshold with the claim on the part of the Commission that the Supreme Court of the District of Columbia is without jurisdiction to set aside the order complained of, because it is not a district court of the United States within the purview of the district court act (38 Stat. 220), and also because, by the provisions of that Act, in cases brought to set aside orders of the Commis- [fol. 63] sion, it is provided that the three-judge court shall include at least one circuit judge, and that a judge of the Court of Appeals of the District of Columbia is not such within the language of the Act.

We think there is no merit in the contention. Section 43 of Title 18, D. C. Code 1929, in relation to the jurisdiction and power of the Supreme Court of the District of Columbia, provides: "The said court shall possess the same powers and exercise the same jurisdiction as the district courts of the United States". And see Federal Trade Commission v. Klesner, 274 U. S. 145, 156, in which the Supreme Court said:

"The parallelism between the Supreme Court of the District and the Court of Appeals of the District, on the one hand, and the district courts of the United States and the circuit courts of appeals, on the other, in the consideration and disposition of cases involving what among the States would be regarded as within federal jurisdiction, is complete."

And see also the opinion of the Court of Appeals of the District of Columbia in Pitts v. Peak, decided May 4, 1931, — F. (2d) —, in which the "parallelism" is demonstrated and traced to its source.

It is next insisted that The Ferry Company may not institute this suit because the order of the Commission does not, it is claimed, invade any legal right which it enjoys, that is to say, that, though it be conceded the establishment of an additional ferry will result in financial loss to the presently established ferry, unless The Ferry Company is able to show that its legal rights will be abridged or impaired, it may not itself accomplish through injunctive relief, in a suit under the Commerce Act, the suppression of competition. Admittedly, The Ferry Company has no exclusive franchise to operate a ferry across Chesapeake Bay, and its right, therefore, to maintain the suit

is based wholly on the anticipated injury resulting to it [fol. 64] from the Commission's order, and we think this clearly is not enough. As far back as Commission v. Chicago, etc. R. R. Co., 218 U. S. 88, 111, the Supreme Court expressed doubt as to the propriety of permitting intervention in an action to set aside an order of the Commission requiring reduction of rates to certain localities by representatives of other localities whose competitive advantage would be affected by the reduction order, and the doubt thus expressed has since been resolved against the right—at least so far as the institution of an independent suit is concerned—in Sprunt & Son, Inc., et al. v. United States, 281 U. S. 249, which was a suit in which the Commission, through a readjustment of rates, had deprived an intervener of a competitive advantage enjoyed under existing rates. At page 254, the Supreme Court said:

"We are of opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under Sec. 3 of the Interstate Commerce Act. For, their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under Sec. 212 of the Judicial Code to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order."

See also Edward Hines, etc. v. U. S., 263 U. S. 143; and Penn. R. R. Co. v. U. S., 40 F. (2d) 921.

It is insisted on behalf of the Ferry Company, however, that the principle announced in the Sprunt case has no applicability to the point involved here because it is [fol. 65] claimed that here the Commission has exceeded its statutory powers, and that its order is void, and that

since the Ferry Company has been permitted to intervene because of threatened financial loss, and can show a financial interest, i. e., in the loss of business through competition, it has a legal right to maintain a suit for an injunction.

If it is true that the Commission is without power to make the order, it would follow necessarily, we think, that this court would have jurisdiction, at the suit of a proper party, to enjoin its enforcement, but we need not stop here to inquire whether The Ferry Co. is such a party since we are of opinion that the Commission had jurisdiction, and that the finding on which the order is based is supported by substantial evidence, and does not exceed the Commission's statutory powers. The Railway Co. had authority under its charter to conduct a railroad business, and the operation of a ferry in connection with or in the extension of its rail lines is an incident of that business, and this is recognized in the Transportation Act (Sec. 1, Par. 3). The order of the Commission finds, "that the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company of ferry service across Chesapeake Bay, in Calvert and Dorchester Counties, Md., as set forth in the application and said report." The report to which the order refers is in all respects similar to the order, and an inspection of the record, we think, discloses evidence on which to base this conclusion, and, in this view, we have no power to review the determination of the Commission, or to substitute our judgment for that of the Commission. U. S. v. New River Co., 265 U. S. 533. The Ferry Co., in the argument, construed the order as authorizing the Rail- [fol. 66] way to conduct a general ferry business separate and distinct from its railway business, and this, it says, is beyond the power of the Commission to do, but we do not think we need pass upon this question or determine in this proceeding whether the certificate of convenience issued by the Commission has that effect or not, nor do we think anything in the certificate requires us, at the instance of the plaintiff here alone, to pass upon the legality of an order of such a nature. It may well be that, if the Ferry Co. has a right to operate a legally established ferry across Chesapeake Bay, any infringement or encroachment upon its rights and patronage through the establishment of an-

other general ferry, that is, a ferry for the carriage of passengers and freight from one side of Chesapeake Bay to the other, would be a matter within the control and jurisdiction of the State of Maryland, and it may be true also that the provision in the Railway Company's charter authorizing it to "run and employ steamboats, or other vessels, to connect said railroad or railroads with other points by water communication" is not sufficiently inclusive to invest it with the privilege of operating a general ferry, or the establishment of a ferry at all except for the transportation of passengers and freight in direct connection with its rail line, but, as to these matters, we express no opinion. See, however, on the subject, Somerville v. Winbish, 7 Gratt. (Va.) 205; Chesapeake Ferry Co. v. Hampton Roads Transportation Co. (Va.) 133 S. E. 563; Fitch v. New Haven R. R., 30 Conn. 38; Harding v. Maverick, Fed. Cas. No. 9,316; The Nassau, 188 Fed. 46; Aikin v. Western R. Co., 20 N. Y. 370. See also 25 C. J. 1067 et seq., and 12 R. C. L. 176. Since the Commission's order, as we construe it, grants the privilege to The Railway to extend [fol. 67] its rail line by ferry from the present terminus on Chesapeake Bay to the other side of the Bay, an order which, by the express terms of the Act (Sec. 1, Par. 18, Transp. Act), the Commission had the authority to make upon a finding of facts which we agree sufficiently shows present or future public convenience and necessity, the further question whether The Railway may, without authority first obtained from the State of Maryland, do an intrastate ferry business, we think, need not now be considered or decided. Obviously it can neither do such business nor make application for a franchise, if one is required, until the certificate of the Commission is first had. The Railway having made its application and established its right to make the desired extension, The Ferry Co. may not, as we think, for any reason shown on the record, annul the certificate or avoid its effect, whatever that may be.

Injunction denied; bill dismissed with costs.

I concur. A. A. W., J. C. A.

[fol. 68] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

In Equity. No. 52254

CLAIBORNE-ANNAPOLIS FERRY COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, CHESAPEAKE BEACH RAILWAY COMPANY, Interstate Commerce Commission, et al., Defendants

FINAL DECREE—Filed June 17, 1931

The above-entitled cause came on for final hearing on May 18, 1931, upon plaintiff's bill of complaint for a temporary and permanent injunction, the defendants United States and Interstate Commerce Commission's motions to dismiss, and the answers of all defendants, replications of plaintiff; and the court having heard and considered evidence adduced and the arguments and briefs of counsel for all parties, and having reached its conclusion for the reason set forth in its opinion, filed herein June 6, 1931, which is hereby referred to and made a part of this decree, that the relief prayed for in said bill of complaint should be denied;

It is therefore ordered, adjudged and decreed that the prayer of the plaintiff's bill of complaint be denied and said bill dismissed for want of equity; and that the defendants have and recover of the plaintiff their costs to be taxed by the Clerk.

Dated June 17, 1931.

Alfred A. Wheat, Jesse C. Adkins.

[fol. 69] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

PETITION FOR APPEAL—Filed June 17, 1931

The Claiborne-Annapolis Ferry Company, complainant, feeling itself aggrieved by the final order, or decree, of the Supreme Court of the District of Columbia, holding an equity court, dated the 17 day of June, 1931, which denied

the relief sought, and dismissed the bill, prays an appeal therefrom to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith. It prays that its appeal be allowed and that citation be issued as provided by law, and that the transcript of the record, proceedings and documents upon which the said decree was based, duly authenticated, be sent to the Supreme Court of the United States.

Jesse I. Miller, Philip B. Perlman, George E. Edelin, Attorneys for Petitioner.

Service acknowledged.

Elmer B. Collins, Attorney for United States. Nelson Thomas, Attorney for Interstate Commerce Commission. Jonathan C. Gibson, Attorney for Chesapeake Beach Railway Company.

[fol. 70] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER GRANTING APPEAL—Filed June 17, 1931

The complainant having filed its petition for appeal herein, the same is hereby granted and the complainant is hereby allowed to appeal said cause, and

It is further orderd that said appeal be and the same is hereby granted to the Supreme Court of the United States upon the filing of undertaking by said complainant in the sum of One thousand Dollars ($1,000.00), with good and sufficient surety to be approved by this Court, conditioned upon the said complainant prosecuting its appeal to effect, and answering all costs if it fails to make its appeal good.

This 17 day of June, 1931.

Alfred A. Wheat, Chief Justice Supreme Court, D. C.
Jesse C. Adkins, Justice Supreme Court, D. C.

Service acknowledged.

Elmer B. Collins, Attorney for U. S. Jonathan C. Gibson, Attorney for Chesapeake Beach Railway Company. Nelson Thomas, Attorney for Interstate Commerce Commission.

[fol. 71] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 17, 1931

Comes now the Claiborne-Annapolis Ferry Company, the plaintiff in the above entitled cause, and files the following assignment of errors upon which it will rely upon the prosecution of its appeal in the above entitled cause from the order and decree made by a Court of three Justices in this Honorable Court on the 17th day of June, 1931, and show that the Court erred in the following particulars, to wit:

1. In concluding that the record, reports, findings, orders and/or certificate of the Interstate Commerce Commission sought to be annulled and set aside herein disclose substantial, or any, evidence of any present and/or future public convenience and/or necessity for the extension of the railway line of the defendant, Chesapeake Beach Railway Company, by ferry from Chesapeake Beach, Maryland, on the western shore of Maryland, to a point on Trippe Bay, on the eastern shore of Maryland, and wholly within the State of Maryland.

2. In concluding that the record before the Interstate Commerce Commission discloses substantial or any evidence of any public convenience or necessity to be served [fol. 72] by the establishment and operation of a vehicular or general ferry between Chesapeake Beach, Maryland, and a point on Trippe Bay, Maryland.

3. In concluding that the present and/or future public convenience and/or necessity for the establishment and operation of a general or vehicular ferry from Chesapeake Beach, Maryland, to a point on Trippe Bay, Maryland, if any such public convenience or necessity exists, gave to the said Interstate Commerce Commission jurisdiction or authority, under Section 1 (18) of the Interstate Commerce Act, as amended, or under any provision of law, to authorize the establishment and operation by the Chesapeake Beach Railway Company of an extension of its railway line by ferry between Chesapeake Beach, Maryland, and the point on Trippe Bay, Maryland, as aforesaid.

4. In concluding that said Section 1 (18) of the Interstate Commerce Act, as amended, is not beyond the consti-

tutional powers of the Congress of the United States to enact, if it be construed to authorize the Interstate Commerce Commission to authorize the establishment and/or operation of a vehicular or a general ferry between points wholly within the State of Maryland.

5. In concluding and decreeing that there was substantial evidence and adequate findings before the Interstate Commerce Commission authorizing or justifying the said Commission in the issuance of the certificate of public convenience and necessity sought to be set aside herein.

6. In not vacating and annulling the said order and certificate of the said Interstate Commerce Commission for the reason that said order and certificate are arbitrary and unlawful, and that the same are based upon no substantial evidence which would authorize the said Commission to issue said order and certificate and in any event are [fol. 73] beyond the powers conferred by the Congress upon the Commission.

7. In not vacating and annulling the said order and certificate of the Interstate Commerce Commission for the reason that the same are arbitrary and unlawful in that the only finding upon which the said Interstate Commerce Commission might authorize the operation of a ferry by the defendant, Chesapeake Beach Railway Company is one that the present and/or future public convenience and/or necessity require or will require the establishment and operation of such ferry for use by or in connection with the railway line of the said Chesapeake Beach Railway Company, and the proceedings before said Interstate Commerce Commission wholly fail to show any present and/or future public convenience or necessity requiring the operation of a ferry for use by or in connection with the railway line of the defendant, Chesapeake Beach Railway Company.

8. In holding and decreeing that the said order and certificate of the said Interstate Commerce Commission are lawful and valid.

9. In holding and decreeing that complainant's right to maintain this action is based wholly on the anticipated injury resulting to it from the Commission's order and certificate, and in not concluding and decreeing that said injury will result from the void and unlawful order and certificate of said Commission.

10. In holding and decreeing that complainant has not sufficient legal interest in the subject matter to maintain [fol. 74] this proceeding.

11. In not concluding and decreeing that complainant may maintain this action if the said order and certificate of the Interstate Commerce Commission are illegal and void and will, if not set aside and annulled, result in irreparable damage to complainant.

12. In holding and concluding that it had no power to review the findings and determination of the Interstate Commerce Commission where said findings and determination were based upon no substantial evidence.

13. In holding and concluding that the Commission's order and certificate grant to the Chesapeake Beach Railway Company only the privilege of extending its rail line by ferry from Chesapeake Beach, on the western shore of Maryland, to a point on the eastern shore of Maryland, and in failing to conclude that said order and certificate further unlawfully pretend to grant to the Chesapeake Beach Railway Company the privilege of establishing and operating a vehicular or general ferry between said points and wholly unconnected with said railroad or use by it for railroad purposes.

14. In failing to conclude that it is beyond the power of the Commission to authorize the Chesapeake Beach Railway Company to establish or operate a general or vehicular ferry business separate and distinct from its railway business, between points wholly within the State of Maryland.

15. In refusing the injunction prayed for and in dismissing complainant's bill.

[fol. 75] Wherefore petitioner prays that said order and decree of June 17th, 1931, be set aside and that it be granted relief as prayed in its original petition.

Jesse I. Miller, Philip B. Perlman, George E. Edelin, Attorneys for Petitioner.

[fol. 76] MEMORANDUM

June 17, 1931.—Bond ($1,000) on appeal approved and filed.

[fol. 77] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER ENLARGING TIME WITHIN WHICH TO DOCKET THE CASE AND FILE THE RECORD THEREOF—Filed June 17, 1931

It appearing that further time is required to reduce to narrative statement the testimony and exhibits contained in the voluminous transcript of the record of the evidence and proceedings before the Interstate Commerce Commission, now a part of the record before this Court, and to assemble, prepare and certify the transcript of the record of this Court on the Appeal, and for other good cause shown;

It is ordered that the time in which the Claiborne-Annapolis Ferry Company, complainant, shall furnish, serve and file in the office of the Clerk of the Supreme Court of the District of Columbia its narrative statement of the evidence offered before the Supreme Court of the District of Columbia and its designation for the record of additional appeal papers which have been filed, and in which to cause the transcript of the record to be completed, and in which [fol. 78] to docket the case and file the record thereof with the Clerk of the Supreme Court of the United States, be, and it is hereby, enlarged to and including August 17, 1931.

Alfred A. Wheat, Chief Justice Supreme Court, D. C. Jesse C. Adkins, Justice Supreme Court, D. C.

Service acknowledged.

Elmer B. Collins, Attorney for United States. Nelson Thomas, Attorney for Interstate Commerce Commission. Jonathan C. Gibson, Attorney for Chesapeake Beach Railway Company.

[fols. 79 & 80] Citation, in usual form, showing service on Elmer B. Collins et al., filed June 17, 1931, omitted in printing.

[fol. 81] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ENLARGING TIME WITHIN WHICH TO DOCKET CASE AND FILE RECORD THEREOF IN THE SUPREME COURT OF THE UNITED STATES—Filed August 5, 1931

It appearing that in a proceeding in the Supreme Court

of the District of Columbia described therein as Claiborne-Annapolis Ferry Company, Plaintiff, vs. United States of America, Chesapeake Beach Railway Company, Interstate Commerce Commission, et al., Defendants, in equity No. 52,254, a three Judge Court has heretofore denied plaintiff's injunction and dismissed its bill and it further appearing that plaintiff has prayed an appeal to the Supreme Court of the United States and that said appeal has been granted by the said Supreme Court of the District of Columbia and it appearing that further time is required to reduce to narrative statement the testimony and exhibits contained in the voluminous transcript of the record of the evidence and proceedings before the Interstate Commerce Commission, now a part of the record before the Supreme Court of the District of Columbia, and to assemble, prepare and certify the transcript of the record of said Court on said appeal, and for other good cause shown; [fol. 82] It is ordered that the time in which the Claiborne-Annapolis Ferry Company, plaintiff below, shall furnish, serve and file in the office of the Clerk of the Supreme Court of the District of Columbia its narrative statement of the evidence offered before the Supreme Court of the District of Columbia and its designation for the record of additional appeal papers which have been filed, and in which to cause the transcript of the record to be completed, and in which to docket the case and file the record thereof with the Clerk of the Supreme Court of the United States, be, and it is hereby, enlarged to and including October 17, 1931.

(Signed) Pierce Butler, Justice Supreme Court of the United States.

Consent.

Elmer B. Collins, Attorney for United States. J. Stanley Payne, Attorney for Interstate Commerce Commission. Jonathan C. Gibson, A. M., Attorney for Chesapeake Beach Railway Company. Jesse I. Miller, George E. Edelin, Attorneys for Claiborne-Annapolis Ferry Company.

A true copy. Test:

Charles Elmore Cropley, Clerk of the Supreme Court of the United States, by Hugh W. Barr, Deputy. (Seal.)

[fol. 83] MEMORANDUM

September 22, 1931.—Narrative abstract of evidence signed in duplicate.

[fol. 84] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed September 2, 1931

The Clerk of the Court is hereby requested to prepare and certify the transcript of the record in the above entitled cause for the use of the Supreme Court of the United States by including therein the following:

1. December 24, 1930—Original bill of complaint.
2. February 2, 1931—Answer of Chesapeake Beach Railway Company.
3. February 2, 1931—Motion to dismiss and answer of Interstate Commerce Commission.
4. February 6, 1931—Motion to make United States party defendant.
5. February 13, 1931—Order making United States party defendant.
6. February 20, 1931—Answer of United States.
7. March 14, 1931—Replication to answer of Interstate Commerce Commission.
8. March 14, 1931—Replication to answer of United States.
9. March 14, 1931—Replication to answer of Chesapeake Beach Railway Company.

[fol. 85] 10. April 17, 1931—Motion to set case for hearing before court of three Judges.

11. April 22, 1931—Order for hearing before court of three Judges.

12. June 6, 1931—Memorandum opinion of Mr. Justice Groner.

13. June 17, 1931—Final decree.

14. June 17, 1931—Petition for appeal.

15. June 17, 1931—Assignment of errors.

16. June 17, 1931—Memorandum of undertaking on appeal.

17. June 17, 1931—Order enlarging time for docketing appeal.

18. June 17, 1931—Citation on appeal, with service thereon.

19. August 5, 1931—Certified copy of order of Mr. Justice Butler of the Supreme Court of the United States enlarging time for docketing appeal.

Narrative of evidence adduced before Interstate Commerce Commission and exhibits attached thereto and order approving the same, together with service thereon.

All other exhibits introduced in evidence.

This designation with service thereon.

Jesse I. Miller, Philip B. Perlman, George E. Edelin,
Attorneys for Plaintiff, 1518 K St. N. W.

Service of copy acknowledged.

Jonathan C. Gibson, Attorney for Chesapeake Beach Railway Company. Daniel W. Knowlton, Attorney for Interstate Commerce Commission. Thomas D. Thacher, Attorney for United States.

[fol. 86] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

ADDITIONAL DESIGNATION OF RECORD—Filed October 7, 1931

The Court will please include in the transcript of record on appeal:

15½.—Order granting appeal. This additional designation.

Philip B. Perlman, Jesse I. Miller, George E. Edelin,
Attorneys for Plaintiff.

[fol. 87] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] SUPREME COURT OF DISTRICT OF COLUMBIA

[Title omitted]

BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 8013

In the Matter of Application of CHESAPEAKE BEACH RAILWAY COMPANY

Narrative Abstract of Evidence

Appearance of counsel:
George E. Holmes and Harry C. Ames for applicant.
Philip B. Perlman for intervenor.

[fol. 89] J. M. RECTOR, a witness on behalf of the applicant, testified as follows:

Direct examination:

My name is John M. Rector, Washington, D. C. I am Secretary-Treasurer of the Chesapeake Beach Railway Company. I have been connected with the Chesapeake Beach Railway Company for 18 years and am familiar with all the tariffs of the Chesapeake Beach Railway Company, both in respect of freight and passenger traffic. I identify this document headed "Charter of the Washington & Chesapeake Beach Railway Company" as the charter of the Washington & Chesapeake Beach Railway Company, Incorporated in September, 1891. (This appears in this Narrative as Exhibit No. 1.) I also identify the certified copy of the Charter of the Chesapeake Beach Railway Company and also a certified copy of the authority to increase the capitalization of that company. (These appear in this Narrative jointly as Exhibit 2.) I also identify a deed of trust issued by the Washington & Chesapeake Beach Railway Company to the American Security & Trust Company. It is dated the 5th day of December, 1893. (This appears as Exhibit No. 3.) I also identify a deed from the Washington, Potomac & Chesapeake Railway Company, to Henry W. Watson, conveying all right, title and interest in right of way, and certain land within the District of Columbia. (This appears as Exhibit No.

4.) I also identify a deed from Henry W. Watson to the Chesapeake Beach Railway Company conveying all rights, title and interest in the right of way and land as per the previous exhibit. (This appears as Exhibit No. 5.)

Mr. Ames: The object in tendering these exhibits, Mr. Examiner, is to show the grant of the original charter to the Washington & Chesapeake Beach Railway Company, the passage of title from that company to the American Security & Trust Company under deed of trust, and the passage of the property from the American Security & Trust Company under deed of trust and the passage of [fol. 90] the property from the American Security & Trust Company to the present owner. The last two deeds are designed to show the transfer of property in the District of Columbia consisting of 2.4 miles of right of way, from the original owners to the present company.

Those five exhibits make a complete chain of title from the original company to the present company. This title covers the property from Chesapeake Junction, D. C., to Chesapeake Beach, Maryland.

By Mr. Ames:

Q. Mr. Rector, has the Interstate Commerce Commission issued a report valuing the property of the Chesapeake Beach Railway Company?

A. It has.

Q. Have you prepared an exhibit containing excerpts of two paragraphs from that report?

A. I have not, but such an exhibit has been prepared.

Mr. Ames: Mr. Examiner, I desire to introduce as Applicant's Exhibit No. 6 a copy of two paragraphs of the Commission's decision in 103 I. C. C. 67.

Examiner Molster: Why not offer the whole decision?

Mr. Ames: I will do that if you desire. These two paragraphs are particularly appropriate to this case and I thought you would have them in a convenient form for your own reference.

Examiner Molster: And you will furnish copies to the opposing counsel?

Mr. Ames: I will right now.

Examiner Molster: Is there any objection, Mr. Perlman?

Mr. Perlman: No, sir.

Examiner Molster: The same will be received and marked Applicant's Exhibit No. 6.

(This appears as Exhibit No. 6.)

I am familiar with the tariff publications of the Chesapeake Beach Railway Company. The Chesapeake Beach Railway participates in joint rates on freight with interstate carriers and has published a tariff containing those charges.

[fol. 91] Mr. Ames: I desire to introduce at this time a copy of the Chesapeake Beach Railway Company's Tariff I. C. C. OC-48 and ask that it be received as Applicant's Exhibit No. 7.

Examiner Molster: It will be received and so marked.

(This appears as Exhibit No. 7.)

The Chesapeake Beach Railway publishes passenger rates from Chesapeake Junction, D. C., to destinations in Maryland, including Chesapeake Beach.

Mr. Ames: Mr. Examiner, I aks to introduce at this time a copy of the Chesapeake Beach Railway Company's local passenger tariff I. C. C. No. 107 and ask that it be marked Applicant's Exhibit No. 8.

Examiner Molster: This document will be received in evidence and marked Exhibit No. 8.

(This appears as Exhibit No. 8.)

Eugene Fox, a witness on behalf of applicant testified as follows:

Direct examination:

My name is Eugene Fox, Washington, D. C. I am Vice-President of the Chesapeake Beach Railway Company. My railroad experience extends over 25 years in different capacities from Assistant General Freight Agent to Vice-President with the Rook Island, the El Paso & Southwestern, the Nacozari Railroad of Mexico, the Southern Pacific Company and the Western Pacific, and the Sacramento Northern, and the Tidewater Southern. I am fa-

miliar with the operation of the Chesapeake Beach Railway Company and with the conditions surrounding the application now before the Commission. I have made a study of the situation and have prepared some exhibits going to the propriety of this application. The point of connection between the Chesapeake Beach Railway Company and the Baltimore & Ohio Railroad Company is at Chesapeake Junction, D. C., and the point of connection between the Chesapeake Beach Railway and the Pennsylvania Railroad is at Pennsylvania Junction, in Calvert County, Maryland. The Chesapeake Beach Railway Company participates in [fol. 92] the joint handling of freight with those two railroads and is a party to joint rates with those two railroads. The Chesapeake Beach Railway Company is a party to general agency tariffs.

Q. In connection with your application, Mr. Fox, did you submit to the Commission a reply to their questionnaire?

A. I did.

Q. I want you to tell, in your own way, Mr. Fox, the circumstances surrounding this application.

A. The proposed ferry is intended primarily for the transportation of passenger and motor vehicles, and package freight.

As the questionnaire is not designed to elicit detailed information peculiarly pertinent to the present application, the following preliminary statement of the essential facts relied upon to support the application is submitted.

Under applicant's charter, it may, among other things, engage in steamboat operation in connection with its rail lines. After a careful survey of the situation it has been determined that the addition of a ferry service will be a profitable enterprise in which the railway should engage and at the same time provide a service to the public which is a necessity and convenience. The supporting data will appear in its proper place in the return to the questionnaire.

In order to finance this project the railroad company asks authority to issue its first mortgage bonds in the sum of $750,000.

Examiner Molster: I would like to inquire right there whether that statement in the return to the questionnaire

is presumed to be an application under Section 20a for authority to issue securities?

Mr. Ames: It is not.

The Witness: The railway derives most of its revenue from passenger traffic. With the advent of the automobile and improved highways, the revenue from this source has for the past five years shown a steady decline, but this has to some extent been equalized by the increase in freight traffic due to the increasing population, and business activ-
[fol. 93] ities of the towns and communities served, and applicant believes that the earnings of both freight and passenger traffic can be materially increased by the extension of a ferry service, the estimated net revenues from which will amount to 5 times the interest on the bond issue.

The service contemplates the purchase or construction of two automobile and passenger ferry boats, of a type designed to carry 95 automobiles on the main deck, with a capacity for 1,800 passengers on the saloon deck, at an estimated cost of $350,000 each.

The distance between ferry terminals is approximately 16 land miles. It is intended to cover this distance in one hour, thus reducing the present time for vehicular ferry service across Chesapeake Bay, at any point, by at least one half hour.

Examiner Molster: I think I will rule, Mr. Ames, in the absence of objection, that the return to the questionnaire will be considered in evidence.

Mr. Perlman: Mr. Examiner, the intervener has no objection to the return to the questionnaire being admitted in evidence.

Mr. Ames: The applicant has no objection. I think it is only fair in that connection for our side to say that this questionnaire is primarily designed to cover rail transportation and for that reason we found it difficult to fit the answers concerning this ferry operation to these questions. With that idea in mind we prepared this preliminary statement, which covers the situation generally.

The return to the questionnaire filed in the docket was received in evidence and appears as Exhibit No. 9 to this statement.

By Mr. Ames:

Q. Will you turn to the exhibit opposite sheet 34 of your questionnaire?

A. Yes.

Q. What does that exhibit show in respect of the net railway operating income of the Chesapeake Beach Railway from 1924 to 1929?

A. It shows a deficit in net railway operating income for [fol. 94] the years 1924 to 1928 and a net earning of $7,439.59 for the year 1929.

Q. To your knowledge is that the first time the Chesapeake Beach Railway Company has ever been out of red?

A. As far back as I can find any figures, yes, sir.

Q. To what do you attribute that change in condition?

A. To economies that we have been able to effect since the present management took hold of the property in 1929, and increased freight traffic but, primarily, to the economies that we were able to effect.

[fol. 95] Those economies are the result of the present management of the railroad and is the same management which proposes this new ferry.

Examiner Molster: In that connection, Mr. Fox, it appears to the Examiner that the principal reduction in operating expenses has been in maintenance of way and structures and maintenance of equipment. Are those the economies to which you have reference?

A. The economies were not due to deferred maintenance, Mr. Examiner. The property has been maintained at a high state of maintenance even in connection with the economies that we were able to effect. Based upon my twenty years' experience in railroading, I would say that this property has been overmaintained. The exhibit opposite page 36 is designed to show the proposed or estimated operating revenues for a period of five years for the proposed ferry. Those estimates are based on figures shown by the State Highway Commission's traffic map which is opposite page 30 of the questionnaire.

Examiner Molster: I should like to ask there whether account has been taken in these estimates of seasonal variations in traffic?

The Witness: Yes, sir, it has. I would like to explain this traffic map. I think you have a legend on the map that

the data from which this map was drawn was based on a twelve-hour traffic counts taken on an average, one day per month, by the state roads Commission.

The various widths of the line show the average daily number of vehicles recorded at each traffic station. In order to get a basis for making our estimates we took the traffic shown at Station T-1 on this map on the Eastern Shore, which happens to be the terminal point of the Claiborne-Annapolis Ferry, and inasmuch as there is no town within 15 miles of this point, that is to say, any town of any moment or business, we assumed that all of the traffic shown on that highway would be intended for ferry service going to or from the ferry or to meet the bus lines which operate at either terminal, and that line shows an average of 780 [fol. 96] cars per day from October 1, 1928, to September 30, 1929.

We further assumed that at lease 32 per cent of that traffic or nearly 33⅓ per cent shown at station T-1 would have origin or destination at points south of the Choptank River in the counties of Wicomico, Worcester, Dorchester, and Somerset of Maryland and two counties in Virginia, Accomac and Northampton. Those counties are the ones which under normal conditions would probably be served by the new ferry, four in Maryland and two in Virginia.

Each of those four counties have the largest towns on the eastern shore, that is, the more important towns from the standpoint of agricultural production, together with Ocean City, which is the only ocean resort in the state of Maryland.

We therefore assumed that 32 per cent of that traffic shown on that highway was a fair basis from which to start to make an estimate of the traffic that would be handled by our proposed ferry, by reason of the fact that from Salisbury and Cambridge to Washington, via the proposed ferry, the distance would be shortened very considerably.

Examiner Molster: May I ask how you happen to hit upon that figure rather than upon some other?

The Witness: It is a pretty difficult matter to find out how many cars are handled in that territory without starting at some base of that sort. We know the vast amount of traffic to and from the counties south of the Choptank River, and the distance between Washington and the points

intended to be served by this ferry would be so greatly reduced that it is a fair assumption that the traffic from Washington and from Baltimore, to some extent, the distance being shorter from these two points, would use the shorter ferry. The figure I have taken of the total number of cars clocked at that particular point is the official figure of the State of Maryland Highway Department. I have estimated that 32 per cent of the cars so clocked would have origin or destination south of the Choptank River. I [fol. 97] have also made another calculation as to the potential traffic to be handled over the proposed ferry, which I think will explain the question the Examiner asked: We have taken the period May 1 to October 15, as the peak period in which most of the traffic moves, being in the summer time or the summer time and the holidays being in that, and divided the two periods of the year into six brackets.

The capacity of these boats will be 95 automobiles, but taking an average of all sized cars, which would include trucks, and things of that kind, we assume there will be a capacity of 90 cars, to be safe.

There are 27 Sundays and holidays in the period just mentioned, May 1 to October 15, and during that period, we expect to make 12 trips per day, that is, 6 round trips.

The capacity for that many days or during that period would be 29,160 cars or 75 per cent of the capacity of the boat.

There are 24 Saturdays in that period——

Q. (Interposing.) Just a moment. You mean the 100 per cent capacity for those 24 Sundays and holidays would be 29,160 and that 75 per cent would be 21,770?

A. Yes, that is correct. I would like to correct that.

Q. Go ahead to the Saturdays.

A. The Saturdays, there would be 288 trips during that period, and the 100 per cent capacity of the boats would be 25,920 cars. We have assumed we would operate at 50 per cent of our capacity during that time, which would be 12,960 cars.

And 117 other days at 12 trips per day would be 1,404 trips, the capacity being 126,300 cars. We have assumed we

would operate those trips at 25 per cent of the capacity of the boats which would be 31,590 cars.

From October 15 to May 1 there would be 28 Sundays on which we would make 8 trips per day. 216 trips at 25 per cent of capacity would be 5,040 cars.

Q. Isn't that 25 cars per trip rather than 25 per cent capacity?

[fol. 98] A. That is quite right. I am in error there. 25 cars per trip. Instead of using a percentage on that bracket we have taken the exact number of 25 cars. 169 days, 8 trips per day, 1,352 trips. We have assumed we would haul 15 cars each trip of 20,380 cars, which makes a total of 91,740 cars, which is slightly higher than the estimate that we have shown in the estimated earnings. However, it just happens to come out that way. I made this second calculation without reference to my first calculation and found that the number of cars was only a difference of 39 between the two calculations. This is a proposed operation and any estimates I made had to be based upon my best judgment, and from the data that was available to us from authentic sources.

Q. On that same exhibit I notice that in the second year you have indicated the estimated cars handled per year as 100,375. What do you base that increase on?

A. In looking up the figures of the traffic statistics furnished by the State Highway System we find that during the period 1926 to 1929, inclusive, up to September 30, that this same territory showed an increase in the movement of cars over the state highways—I am speaking of the Eastern Shore now only—of 57 per cent, and we thought it was fair to use only 10 per cent of that in carrying out our calculations for the balance of a 5 year period.

Q. You used 10 per cent, notwithstanding you found the normal increase of vehicular traffic was 57 per cent.

A. In the past four years it was 57 per cent in that territory.

Q. You have on the exhibit opposite page 38 an item of $103,567 for operating expenses. How did you arrive at that figure?

A. That figure was arrived at by the engineer. He will be able to give the detail for that.

By Mr. Ames:

Q. I would like to revert for a minute to this exhibit opposite page 36, the one you were discussing then. I want you to tell the Examiner how you arrived at that estimate of [fol. 99] passenger traffic, 182,500.

A. Assuming we would handle 250 cars per day, average, and the further assumption that each car would contain two pay passengers, together with the prospective business that might be handled in connection with bus lines or in connection with our railroad, which would bring the passengers to and from the ferry, we arrived at that figure. We have increased it from year to year using the same 10 per cent figure.

Q. How did you arrive at your average cost per car to get your estimated yearly vehicle revenue?

A. We took the tariff on file with the Public Service Commission of Maryland by the Claiborne-Annapolis Ferry and found that the range of charges or rates of fare were from two and one-half dollars for a small car, 110 inch wheel base or less, to $12 for a loaded truck, which was the highest rate. So we took $3 as an average charge for this estimate, feeling that that would be fair; that that would be within that range of prices.

Examiner Molster: This is not intended to indicate that you intend to handle all automobiles at the same rates?

The Witness: Not at all. This is an estimate on which to base our estimate, which we feel is fair.

Examiner Molster: That would indicate a large preponderance of passenger automobiles, would it not? The average arrived at?

The Witness: Yes, I should say it would. More passenger cars than trucks.

By Mr. Ames:

A. Mr. Fox, will this proposed ferry be equipped to handle passengers from Chesapeake Junction to the Eastern Shore of Maryland?

A. Yes, sir. We propose to establish a station at the eastern terminus of the ferry, possibly the town of Hudson, there being such a village at the ferry landing or close to it. As a matter of fact, right at the junction of the property at which the ferry will land, and the State

[fol. 100] Highway, here is a town called Hudson and a post office. I believe the name of the post office is Thomas. It will be our purpose to handle or to sell tickets from Chesapeake Junction, D. C. to Hudson, Maryland, which will be the eastern terminus of our ferry.

Q. Those will be through passenger tickets?

A. Yes, sir.

Q. Operating over your line to Chesapeake Beach and the ferry line beyond?

A. Yes, sir.

Q. Do you now hold yourselves out in your tariffs to carry passengers from Chesapeake Junction, D. C. to Chesapeake Beach, Maryland?

A. Yes, sir. Our regular trains are scheduled to and from Chesapeake Junction to Chesapeake Beach, the eastern terminus of the railroad. This ferry will be equipped to transport loaded passenger buses across the bay. If a passenger bus route were to be established from Washington, D. C. to Ocean City, Maryland, this ferry would be capable of handling that bus across the bay, all sorts of vehicular traffic.

Q. Could that transfer be made without unloading the passengers?

A. Yes, sir.

Q. Mr. Fox, do you know whether or not any development work is now taking place at Chesapeake Beach with a view of affording an amusement park?

A. Yes, sir.

Q. Would this ferry be in a position to handle passenger traffic from Cambridge, Maryland, to this amusement park?

A. Yes, from any point on the eastern shore to this amusement park.

Q. Would this ferry be equipped to handle merchandise, package freight, from any destination in Official Territory to Maryland destinations?

A. It is our purpose to handle package freight on the [fol. 101] ferry from any point in C. F. A. or Trunk Line territory to Hudson station, where we will have a freight station in connection with our mole.

Q. Will you please explain Sub-Exhibit No. 12 of Exhibit 9?

A. This exhibit is designed to show the estimated net income from the combined railway and ferry service for a period of five years.

We have shown that the railroad earned in 1929 $7,439.59, and assuming that that would continue at that ratio up to 1931 when the ferry would be in operation and in addition to the present revenue would derive the revenue which will be produced by the extension of the ferry service, it is fair to assume the railroad should show a net of $312,000 for that year which would be the first year of the ferry operation, together with $117,433, shown as net revenue from the ferry operation, would give the railroad a total net income of $148,633.

That includes the operation of the ferry. That is all that I have to say on that exhibit.

By Mr. Ames:

Q. Mr. Fox, are there any other exhibits in that questionnaire which you desire to explain, for example Sub-Exhibit No. 11, opposite page 44, briefly stating recapitulation of your railway operation, 1931 to 1935, inclusive?

A. Yes, sir. I might explain that 1931 is used there because of the fact that we expect this ferry to be in operation in 1931. It takes a year to build these boats. Therefore the estimates are based on 1931. That exhibit is designed to show the estimated earnings of the railroad in 1931. That does not include the ferry.

Mr. Ames: In order to make this a little shorter, I might say this questionnaire includes the estimate for the railway company from 1931 to 1935, estimates for the ferry company during that period and the combined estimate for the railway and the ferry. Those are all included in this questionnaire.

Examiner Molster: Mr. Fox, this sub-exhibit No. 11 indicates increases from year to year and increases over the [fol. 102] amounts shown in Exhibit No. 6 in freight and passenger revenues. Is that based, in part, on the assumption of increased business to be derived from operation of the ferry?

The Witness: I think I stated that the net earnings for 1929 of $7,439.59 were extended at the same ratio to 1931.

Examiner Molster: What I intended to develop was whether you expected increased traffic on the railroad as a result of the operation of the ferry.

The Witness: Yes, we do.

By Mr. Ames:

Q. In other words, you will not only handle vehicular traffic but you will handle passenger traffic from Washington, D. C.

A. Yes. The increase to the railroad will come from passenger traffic using the ferry and the railroad.

Examiner Molster: And also freight traffic?

The Witness: And package freight traffic.

By Mr. Ames:

Q. Do you expect to develop or create any new traffic by the operation of this ferry?

A. Yes. We think there will be a great deal of new traffic developed by the opening of this new traffic route between the western and the eastern shore by reason of its shorter route between the main towns south — Choptank and Washington, and points west and south of Washington on the western shore, and that there is a vast amount of tourist traffic, tourist automobiles, that comes to Washington each year, and our investigation developed the fact that a great many of these tourists could be induced to visit the eastern shore and use our ferry that do not use it now.

I mean to say that they do not now go to the eastern shore by reason of its isolation and the lack of transportation facilities or adequate transportation facilities. The shortness of the route would be a big factor in getting that traffic. Also it will produce a new route in the shape of a circle tour. Tourists may go over one way and come back the other, or, when they are expecting to go east through New [fol. 103] Jersey they can go that way and visit points south of the Choptank in eastern Maryland, Ocean City, and points on the lower peninsula in the Accomac section, and the fact that Ocean City is really the nearest ocean resort in the State of Maryland, and the only one, will cause a great many people to use this ferry because they can get to Ocean City and back to Washington with a reasonable length of time at the Ocean resort in the same day, the route shortening the present distance by 24 miles in each direction.

Examiner Molster: Have you thought to specify what the attraction will be for tourist traffic besides Ocean City?

The Witness: Yes, sir. The eastern shore is very replete with historical lore. It is well advertised. It is becoming

well advertised and we feel that with the advertising that we will give it and the service across the bay at that point, it will induce a great many people to go over there in machines and on bus lines and visit it that do not use it now and do not get over there on that account. We expect a great deal of traffic from the eastern shore to the western shore. This new seaside park we have in course of construction at Chesapeake Beach will furnish another source of traffic for the ferry from the eastern shore.

Examiner Molster: Is that part being developed by the railroad company or affiliated interests?

The Witness: It is being developed by the Chesapeake Beach Hotel Company. There is no corporate connection between the railroad and the Hotel Company. I might add that we feel that there is sufficient attraction the the eastern shore opened up by more advantageous traffic channels such as this ferry will provide to greatly increase the traffic and visitors to that shore. It is a highly attractive country and from past history it has not been very greatly exploited along those lines. The Chesapeake Beach Railway Company is an interstate common carrier by railroad and is subject to the Interstate Commerce Act. It files annual reports [fol. 104] with the Interstate Commerce Commission and has been valued by the Interstate Commerce Commission.

Q. Has this railroad had difficulty since its history in earning any profit whatever on its investment?

A. The figures I have go back to 1924 and I understand it never has been a paying investment. I think I stated in my preliminary statement that it is felt that by the addition of this ferry service it will enable the railroad to be self-sustaining and to make a return or, in other words, to increase the net after operating charges. Based upon my 20 years' experience as an operating railroad man, I think that the operation of this ferry route as an adjunct to this railroad will help to rehabilitate the railroad. I think it will put the railroad in a position to earn its way, which it never has done before.

Cross-examination.

By Mr. Perlman:

Q. How long have you been with the Chesapeake Beach Railway?

A. Since June, 1929. I believe that the railway company has been overmaintained in the last five years.

Q. And the fact that it has been overmaintained accounts for the reduction which I assume you made in the maintenance and operating expenses in the last year?

A. Not altogether in maintenance, if I understand you correctly.

Q. There were two items given in this statement, maintenance of way and structures and maintenance of equipment. Those items show a decrease from 1928 to 1929, the first one $38,000, roughly, to $25,000, and $27,000 to $19,000?

A. Yes, sir.

Q. They are the major items in which the reductions were made during the past year?

A. Yes, sir.

Q. Mr. Fox, the net railway operating income last year was $7,439.59. That is the operating income. Do I under-
[fol. 105] stand the railway showed a loss on the year's operating taking into consideration its fixed charges?

A. A very material loss. This statement does not deal with the funded debt. That is, that statement simply shows that the railroad had $7,439.59 left after paying its actual operating expenses for the year 1929 and has nothing to do with its funded debt or its interest on obligations or anything of that sort.

Q. What was the loss in 1929?

A. I could not answer that but we have a witness here who will be able to answer that. It is on file with the Interstate Commerce Commission.

Mr. Ames: We will have a witness who can give the underlying data for the exhibit.

By Mr. Perlman:

Q. The operation that you propose from Chesapeake Beach in Calvert County to a point on Trippe's Bay in Dorchester County, I understand that service will be maintained by two boats which you testified will cost approximately $350,000. You also testified those boats will have a carrying capacity of 95 motor vehicles and 1,800 passengers. I would like to know where you got your estimates of the cost on those boats?

A. You mean the name of the firm which gave us the estimates on the boats.

Q. I do not want any trade secrets.

A. Don't you think that possibly would be a trade secret?

Q. I would like to know whether you got more than one estimate. What investigation did you make to ascertain what the cost of such a boat would be?

A. We investigated it through such channels as the Southern Pacific Railway, which operates many boats on San Francisco Bay—the cost of those boats. Also through —I can name you several boat building companies, if you like, among them the one who built the John M. Dennis, which you are operating,

[fol. 106] Q. Among them the one that built the John M. Dennis for the Claiborne-Annapolis, and which it is now operating?

A. Yes. I am speaking of "You" as a representative of the Claiborne-Annapolis Ferry.

Q. You concluded from those estimates that you could get two such boats for $350,000?

A. We think so. That is an estimate. This is each.

Q. $350,000?

A. Yes. We priced the John M. Dennis and we were told it was around $318,000. However, that was not a determining factor in making our estimate of $350,000.

Q. The estimates that you made as to the business that you expect to develop in this ferry service you have set out here—I call your attention to sub-exhibit No. 7, and you give the figure of 91,215 cars which you expect to handle the first year. May I ask you to explain to us again where you got that figure? How you made that estimate?

A. We took the figures shown by the state highway traffic map or table. To be perfectly exact, it is the traffic map of Maryland showing the distribution of traffic over state highways' systems for October 1, 1928 to September 30, 1929.

We found by scaling that, that at Station T-1 which represents Claiborne, there were 780 cars per day on that road. We felt that it was fair to assume that at least one-third of those cars would have origin and destination south of the Choptank River. That conclusion was reached after a survey of the machines on the highways at Crisfield, Pocomoke, Ocean City, Cambridge, Salisbury, from the charts of the State Highway Commission.

Q. You took a percentage of the motor vehicles that you found at Claiborne?

A. Yes, sir.

Q. What information or what facts have you from which [fol. 107] you could make an assumption that the motor vehicles counted at Claiborne have any relation to the traffic across Chesapeake Bay from Chesapeake Beach to a point on Trippe's Bay in Dorchester County?

A. We felt in the first premise that one-third of the traffic would have origin or destination south of the Choptank River.

Q. Why do you say one-third? Why not one-tenth or one-half?

A. We felt that one-third would be a very reasonable estimate.

Q. You just picked that percentage out of the air, didn't you?

A. Not necessarily, no.

Q. Where did you get it?

A. Most of the business to and from those points south of the Choptank River now goes over the Claiborne Ferry and by reason of the shorter route through Cambridge and mileage, the distance on the ferry, we feel that a good many of those cars would use the Cambridge route.

Q. Did you maky any canvas of the people in those vehicles to find out whether they would prefer a route from Chesapeake Beach to Trippe's Bay——

A. (Interposing.) No. We just assumed they would because it would be shorter.

Q. Do you know where the machines you say were in Claiborne came from?

A. No.

Q. As a matter of fact, then, you haven't any real basis for that percentage of yours at all, have you?

A. As an estimate.

Q. Except as you say, you just thought it was a reasonable estimate?

A. Yes, sir.

Q. Suppose I tell you that that figure of over 91,000 vehicles that you expect to carry in the first years in your operation from Chesapeake Beach, to a point on Trippe's Bay, in Dorchester County, is a larger number of motor vehicles than has ever been carried by the Claiborne-Annap-

[fol. 108] olis is all the years of its operation in any one year, would that have the effect of changing or making you feel that you were a little enthusiastic in arriving at that figure of 91,000?

A. Not at all. I would still feel that my estimate was very low.

By Mr. Perlman:

Q. Let me ask you, did you make any inquiry as to how many vehicles are crossing the bay annually on the Claiborne-Annapolis Ferry?

A. No. I made no estimate. I assumed the traffic chart shown by the State Highway Commission was authentic.

Q. Explain to us, if you can, what that traffic chart has to do with the proposed service for motor vehicles across Chesapeake Bay?

A. It shows that the point of Claiborne, which is T-1 there were 780 cars, and we assume those cars, there being nothing else at Claiborne were there for the purpose of either crossing or getting someone at the ferry, particularly crossing to and from the eastern and western shores. In addition to that, as I stated in my direct testimony, we expect to increase this business very materially by this shorter route, and more particularly from Washington and tourist travel.

Q. Mr. Fox, do you know the distance between Washington and Chesapeake Beach on the State Highway?

A. I think so.

Q. Do you know the distance between Washington and Annapolis on the State Road?

A. Yes, sir.

Q. Is there any material difference between those distances?

A. At the present time I do not think there is very much. Chesapeake Beach may be a little shorter just at the moment.

Q. There is going to be——

A. (Interposing.) I might add the figures we have are based on the completion of the new extension of the Crane Highway.

[fol. 109] Q. They are based on the completion of some road which is proposed to be completed this spring or summer?

A. Under course of construction at the present time. I am told the contract provides that it be completed by the 15th of May.

Q. When it is completed, assuming it will be completed, there will not be any material difference between the distance between Washington and Annapolis, which is a terminus of the Claiborne-Annapolis Ferry Company, and the distance from Washington to Chesapeake Bay, which is the closest terminus of the proposed ferry service. That is correct?

A. By the proposed route it will be shorter to Chesapeake Beach in the neighborhood of four to six miles. Something like that. I think in the operation of an automobile or motor truck on the highway four to six miles is material, yes. It might not be on the railroad, but I might add to that that the railroad mileage from Chesapeake Junction to Chesapeake Bay is considerably less than the mileage from Washington to Annapolis by rail.

Q. But I was thinking more particularly of the motor vehicle service that you propose——

A. (Interposing.) Passenger traffic is also included in our estimates.

Q. (Continuing:) —because the greater proportion of your revenue will come from that source. Therefore, there will be when this road is completed only approximately four miles difference between the two trips, that is, one to Chesapeake Beach from Washington or one to Annapolis from Washington?

A. I am not sure that it is 4 miles. It may be a little more than that. However, the shorter trip across the bay will have some effect upon the business we are discussing.

Q. But you haven't reached the Bay yet. We will get down to either Annapolis or to Chesapeake Beach leaving Washington.

A. I understood you to ask your question in connection [fol. 110] with the one you asked before about how we arrived at the——

Q. (Interposing.) I was trying to bring out how anybody in Washington could get to our ferry approximately just as soon as they could get to the proposed ferry at Chesapeake Beach if they wanted to go across to the eastern shore. As I understand it is approximately, or will be approximately about 4 miles difference between the distances

to the Chesapeake Beach ferry or the Claiborne-Annapolis Ferry at Annapolis.

A. Your question is designed simply for an answer as to the mileage?

Q. Yes.

A. You say it would be as convenient?

Q. No. I didn't say that. I am taking your own estimates that there will be approximately four miles difference?

A. In mileage.

Q. Yes. After you go to either one or the other of the places, either Chesapeake Beach or to Annapolis, then the question as to which is more convenient or which is the shorter route depends upon what part of the eastern shore any passenger wants to go to. That is true, is it not?

A. Yes, sir.

Q. So that while you have given figures or distances to show that those desiring to go to the lower part of the eastern shore could get there—would have a shorter route from Chesapeake Beach across, it is, likewise, true that those desiring to go to the upper five counties mentioned before as being particularly served by your ferry, would have a longer distance to go than via the Claiborne-Annapolis Ferry?

A. Yes. Might I add I made no mention of the other five upper counties.

Q. No. I mentioned it. I thought the Examiner might be interested in them. Will you tell us the distance across Chesapeake Bay covered by your proposed terminus from Chesapeake Beach to Trippe's Bay?

[fol. 111] A. 13.71 nautical miles.

Q. Could you tell us in land miles what that would be?

A. 15-3/4 miles, I think. However, we have an engineer who will testify to those exact mileages.

Q. What time do you calculate it will take the ferry to cross the bay?

A. One hour.

Q. What horse power are these boats that you are supposed to purchase? Of what horse power will they be?

A. My recollection is 2,400, Mr. Perlman. However, Mr. Horn, our engineer, will testify to those technical points.

Q. What is the speed of your proposed boats?

A. I haven't the specifications before me, Mr. Perlman.

Examiner Molster: Are those specifications in the record?

Mr. Ames: We will have an engineer testify to them, and they are in the record now. Sub-exhibit 9 contains all the specifications.

By Mr. Perlman:

Q. This estimate you are making of the speed is an estimate that will be covered by an engineer?

A. Yes.

Q. Is that engineer here and is he going to testify?

Mr. Ames: Yes.

By Mr. Perlman:

Q. I would like to ask you if you have or propose to adduce any further testimony that would tend to substantiate the figures that you have given with respect to the amount of traffic, both passenger and vehicular.

A. I think my counsel can answer that question better than I can.

Mr. Ames: Read the question please.

(The Reporter read the question as above recorded.)

Mr. Perlman: On the proposed ferry service.

Mr. Ames: I will have some redirect examination of Mr. Fox on that point. I will have no other witness on those figures.

By Mr. Perlman:

Q. I understand, Mr. Fox, and I want you to correct me [fol. 112] if I am wrong as I would like to be accurate about it, that all of these figures are based on the number of machines that were counted in Claiborne, Maryland. It that right?

A. Not wholly, sir. They were based on the figures shown by this map of the traffic survey of the highway which I have shown. As a base we started with the Claiborne station, with the assumption that there being nothing else on that road or practically nothing else within 15 miles, and when I say "Nothing Else" I mean there is a little town or two and probably some few farms, but there is no traffic that I would consider of moment and we assumed that the traffic at that station was intended for ferry service or in connec-

tion with the ferry, but our estimate does not stop with that. We just use that 250 cars a day. We expect that to be supplemented by business wholly new to that section, tourist travel and other business which will be created by a shorter route and interchange of traffic between points south of the Choptank River and Washington, truck service, if you please, vegetables and produce that comes over there which now does not come into Washington direct. It possibly, is handled through some houses in Baltimore. That will create a new traffic which will be wholly new to transbay traffic. It is our assumption that using 250 cars a day, that that traffic will be included—that is the new traffic will be included in that amount. We show a wholly new route for a new channel of traffic that does not now exist.

Q. You have already testified that you made no inquiry as to the destination of the machines at Claiborne but you just thought it was fair to take approximately 30 per cent as——

A. Just for the purpose of the estimate. I think it was fair, having in mind the new traffic we expect to develop, in addition to what might come to Claiborne.

Redirect examination:

By Mr. Ames:

Q. Has this ferry you are proposing ever operated, this proposed ferry?

A. No.

[fol. 113] Q. Has it ever existed for the handling of traffic?

A. No, sir.

Q. Will you tell the Examiner how in the world you could do anything but estimate the number of cars you would carry?

A. I think the questionnaire provides that you estimate the traffic for the period.

Q. Could you have done anything but estimate?

A. No, sir, nothing to work on.

Q. In arriving at this 32 per cent did you take into consideration the possible new traffic or did you just base that on 32 per cent of the year's at station T-1?

A. No. Station T-1 showed there were 780 cars and we felt that the traffic to and from points south of the Choptank augmented by the new traffic we would create by

reason of our shorter service between Washington and points west of Washington and points on the eastern shore, in the four lower counties and the two counties of Virginia, would amount to at least 250 cars per day which is approximately 32 per cent of 780. In addition to that possibility we have the possibility of new traffic. I inquired into the population of these counties on the eastern shore, the automobile registrations and every source of information I could possibly think of that was available to me and on that investigation I estimated 250 cars a day. I have had experience on other railroads in estimating possible traffic—25 years or a little longer. In taking this figure of 780 cars, I did not stand over there and ask every fellow that came by where he was going. I would not have a right to do that and he probably would not tell me.

Q. In your direct testimony, Mr. Fox, you also made another entirely independent estimate, didn't you, based on capacity operation?

A. Yes, sir.

Q. That came out pretty close to your other estimate, didn't it?

A. Very close, within a few cars.

[fol. 114] Examiner Molster: That, of course, was a mere coincidence, I suppose?

Mr. Ames: Yes, a coincidence, your Honor, a very significant one, however.

The Witness: In making that, Mr. Examiner, we know, as a matter of fact, that the peak movement is during certain seasons of the year when tourists and people are traveling. We know that it is less at other seasons of the year. We made the best estimate we knew how to with the information available. I do not think we could have done more.

Q. How about the distance across the bay?

A. That is materially shortened between points south of the Choptank and Washington or Chesapeake Beach as compared with from and to the same points and Washington via Annapolis.

Q. I want to be fair. I am not talking about the interior destination of the passenger. I am talking about the water haul from slip to slip. How does that distance compare?

A. It is my understanding that the Clairborne-Annapolis line is 23 miles. I am not sure about that. I do know the

correct mileage for the Chesapeake Beach-Trippe's Bay route. I have seen their report to the Public Service Commission of Maryland in which the Clairborne-Annapolis Ferry Co. show they receive a subsidy from the State of Maryland—I think something like $23,000. My understanding is that it is based on a thousand dollars per mile ferry travel in lieu of maintenance of highway for the same distance, per mile.

Q. If we assume the difference in the distance across the bay over the two routes is 7 miles about how much time would that save the passenger in his trans-bay movement?

A. 30 minutes.

Mr. Perlman: Ask him what passenger. Where is he going?

By Mr. Ames:

Q. The difference between the Annapolis-Clairborne passenger and the passenger on the proposed ferry, who, ac-
[fol. 115] cording to our estimate, will make the trip in one hour. I am basing the question on that assumption. If we assume the time saved is 7 miles—or the distance saved is 7 miles, how much time do you think that would save?

A. 30 minutes in the cross-bay movement. I am familiar with the approach to the Annapolis Ferry from the Defense Highway, the Washington road. I have been over it quite a number of times. I should say probably 15 or 20 times. In reaching that ferry at Annapolis, you have to drive through the main section of the city.

Q. Contrast that with the entrance to your Chesapeake Beach Ferry, what kind of country do you traverse going to that ferry?

A. I should say a wide open country: an agricultural country.

Examiner Molster: As long as we are talking about the country the Examiner would like to inquire whether counsel proposes to adduce testimony of the kind contemplated by questions 18 and 19 in the questionnaire?

Mr. Ames: We will cover that, Mr. Examiner. In response to the Examiner's questions in respect to the possibility of adducing evidence in reply to questions 18 and

19 of the questionnaire we desire to state that it is not our plan at present to handle carload freight traffic. We deem these questions peculiarly applicable to carload business and for that reason in our reply to the questionnaire we have indicated that they are not applicable to our operation. We do expect, however, to handle some merchandise or package freight moving in interstate commerce.

Examiner Molster: Do you expect to show the sources of the probable movement of the package freight?

Mr. Ames: Anything we might show in that respect, your honor, would be the barest kind of a guess. I have in mind one particular kind of package freight which will very likely move from Washington, and that is ice cream. As to other possible sources of freight, as I say, it would be the barest kind of a guess because we do not propose to operate until 1931. We can not very well solicit on that [fol. 116] basis, but the world is open to us on package freight.

You have wholesale houses in Baltimore and in Washington, jobbers, if you please, who move package freight in considerable quantities to the eastern shore of Maryland. We shall certainly endeavor to our utmost to get that business for this ferry or at least a fair share of it, but I do not know that I could introduce any witness that would testify positively on just what we expect to get.

Examiner Molster: I think if you will pardon the interruption, there is something in the testimony or else in the return to the questionnaire concerning the probably movement of perishables and seed products to Washington.

The Witness: That was intended, if I may say, Mr. Examiner, in response to the truck traffic moving to and from those points.

Examiner Molster: Rather than traffic of the railroad?

The Witness: Rather than traffic, carload freight.

Mr. Ames: We expect to put on a produce man from Washington here who will testify about the possibility of the service. We will probably have other people who can testify as to the freight possibilities as well as the passenger possibilities.

Examiner Molster: It would seem to me that in the present state of the record you are asking the Commission to take notice of all the things that are produced on the eastern shore and possibly the testimony which you now suggest will cover the point.

Mr. Ames: I might say that was one of my reasons for asking you to put the case on in my own way because some of these questions in here are so plainly inapplicable that I think we would have a better record by putting the case on in the usual way. I leave it to your judgment, however.

Examiner Molster: I do not wish to interfere with counsel's presentation of his case.

Mr. Ames: You have not and I do not want to put you in that position.

[fol. 117] There is one more question that I would like to ask Mr. Fox.

By Mr. Ames:

Q. You do not expect to serve any industry by this ferry in the way of a plant facility or anything of that kind, do you?

A. There is none contemplated at this time.

Q. Are any of the securities which you anticipate asking authority to issue on account of this project to be underwritten by industries to be served by the proposed line?

A. No, sir.

Q. Have you received any aid, gift, grant or right of way or has any donation been promised in connection with the proposed new line of——

A. No, sir.

Recross-examination.

By Mr. Perlman:

Q. I note in the return to the questionnaire that you give an estimate of the population of the territory to be served by the proposed service. The population is 248,294. That territory containing that population is what?

A. Wicomico, Dorchester, Somerset and Worcester Counties in Maryland and Accomac and Northampton Counties in Virginia. The population of the counties of Accomac and Northampton in Virginia is approximately 60,000. I accrued my estimate of population of the four Maryland Counties from this Market Data Handbook of the Department of Commerce, United States. I have looked at the 1920 census of those four counties, but I thouht 1920 was so far back, and this other authority, the figures given by the Department of Commerce was much better, 1927.

I cannot give those figures by counties. I haven't the book with me but the volume referred to will give it. I will be glad to produce it.

Q. I would like to see that because there is a pretty wide discrepancy between the figures you suggest and the 1920 figures of the census.

A. There should be between that and 1920 because that is almost 10 years ago.

By Mr. Perlman:

Q. You haven't those other figures here?

[fol. 118] A. I haven't them with me.

Examiner Molster: Could that be produced by the applicant at the afternoon session?

Mr. Ames: Yes, sir.

A. I do not recall the 1920 figures. I do not know anything about the additional route of the Claiborne-Annapolis Ferry Company from Annapolis to Kent Island. I have heard of it. I have heard of such a proposed route. I know nothing about it, however.

Q. Have you heard that new operation—that additional operation will go into effect in either the month of May or June this year?

A. I think I have heard that rumor. I know nothing authentic.

Q. Do you not know that that route, the new service, will have a water haul of only 6½ miles across Chesapeake Bay?

Mr. Ames: Do not answer. Mr. Examiner, that is so plainly an undue broadening of the issue here that I am going to object. We are not trying the propriety of the Kent Island Ferry route.

Mr. Perlman: Mr. Examiner, he undertook to make some comparisons of the distances between the Claiborne-Annapolis operation and his proposed operation, and of course, I think the Examiner ought to have an idea of our operations, present and proposed, before any conclusion is to be drawn.

Examiner Molster: Do you propose to establish the fact of that operation?

Mr. Perlman: Absolutely.

Mr. Ames: I will withdraw my objection. Let him answer.

The Witness: No. I understood it was going to be more like 8 miles or something of that sort. That was my information.

By Mr. Perlman:

Q. I think you gave the figure of approximately 23 miles for the present water haul?

A. To the best of my knowledge.

Q. If I told you that it was 19 and three-fourths miles would that refresh your recollection any as to the accurate distance?

[fol. 119] A. I have no knowledge of the actual distance. My understanding of the distance was probably somewhat influenced by the amount of the subsidy based on the $1,000 I understood the State paid per mile. That may have influenced me to believe that it was 23 miles. To answer more fully your question about the other proposed ferry, I gave it no consideration. Because of its distance north I did not think it would be in any way connected with the service we propose to perform in the southern counties.

By Mr. Perlman:

Q. I think it was you or your counsel—somebody made a suggestion about the amount of summer traffic to Ocean City, Maryland: Could you give us any estimate of the differences between a route over your proposed ferry from Washington to Ocean City and the Claiborne-Annapolis Ferry Company?

A. 24 miles shorter via the proposed ferry than via Claiborne between Washington and Ocean City.

By Mr. Perlman:

Q. I meant how much of the difference between the two routes is water haul?

A. It would be the distance between your ferry route and our ferry routes which I understand your distance to be 23 miles.

Q. I understand, Mr. Fox, that you are making no special claim as to the source of merchandise that you expect to carry?

A. No. It is all proposed. We will have a freight station at our other terminal as we have at the western shore termi-

nal and we expect to handle some package freight business.

Q. I understood either you or counsel to say that what you had particularly in mind was business from Washington to the eastern shore or vice versa.

Mr. Ames: I do not think any such statement as that was made.

Mr. Perlman: I think Mr. Ames said——

Mr. Ames (interposing): I said that was incidental.

Mr. Perlman: I wanted to get it clear that there is business now going to Baltimore which would go to *Baltimore*. I think you said that.

[fol. 120] Mr. Ames: Going where? Business now going to Baltimore which would go to Washington?

Mr. Perlman: Yes, if the new ferry is established.

Mr. Ames: I didn't say anything about that.

Mr. Perlman: I understood you to say that a little while ago.

By Mr. Ames:

Q. Did you say that (addressing the witness)?

A. I do not recall what I said. We expect to inaugurate a new business between Washington and these points by reason of this new ferry and the shorter route. We expect that will create some new business.

By Mr. Perlman:

Q. Do you expect business now going to Baltimore, any part of it?

A. We would naturally expect to get some of it via a shorter route. The route being shorter, we would expect some of the Baltimore business to travel our way and avoid the congestion in the City of Annapolis and get the benefit of this more convenient ferry service.

By Mr. Ames:

Q. You also expect to open up the Washington market to the eastern shore growers, do you not?

A. Yes, sir.

Q. This ferry at Kent Island you have heard remarks about in these remarks. Did you hear that was going to be built by the Claiborne-Annapolis Ferry Company?

A. I think so. That is my recollection.

By Mr. Ames:

Q. Is that the same company which is protesting your application?

A. Yes, sir.

Q. Have you heard of anybody except that ferry company making any objection to your ferry?

A. No, sir.

Examiner Molster: Just for the sake of absolute clarity, does the Examiner correctly understand that the station marked T-1 on Sub-Exhibit No. 4 represents the City of Clairborne?

The Witness: Yes, sir.

[fol. 121] Examiner Molster: How is that Choptank River delineated on this map?

The Witness: The Choptank River—Cambridge is shown as D-5. That is located on the Choptank River. This water, which as the eastern shore gentleman say, "makes up" behind Cook's Point, is the Choptank River.

After Recess

Dr. CHARLES W. PURNELL testified as follows:

Direct examination:

My name is Charles W. Purnell, Manager of the Atlantic Hotel, Ocean City, Md. I am President of the Chamber of Commerce, Ocean City, Md. The Chamber of Commerce at Ocean City has considered and discussed the proposed ferry route here under consideration and the members, as far as I can find out, are all favorable, although we have never voted on the proposition. I have discussed this proposition with various members of the organization and have found no opposition in the Chamber of Commerce against this proposed ferry route. They are all heartily in favor of it. I am familiar with the general trend of the tourist business which is now coming to Ocean City and feel that the proposed ferry route will increase that tourist business.

Q. What are the reasons behind that belief, Doctor?

A. Well, more direct communication between Washington and Ocean City and a quicker route, no doubt, will bring a very large increase in the tourist business to Ocean

City, in the estimation of myself as well as a great many others. There is direct rail connection between Cambridge and Ocean City, Md. by way of Hurlock. There is no line of railroad running direct from Cambridge to Ocean City, Md. There are improved highways from Cambridge to Ocean City, Md. by a roundabout way. The most logical route I would say is by way of Vienna, providing there was a bridge crossing the Nanticoke River. There is a movement on foot, toward constructing a bridge at Nanti- [fol. 122] coke. I have been located at Ocean City for eight years and am familiar with the present means of getting into Ocean City from northern points, such as Washington.

Q. Do you think that the present means of communication as between Washington and Ocean City are satisfactory?

A. Well, that really depends a great deal upon how you are to get there. A person owning an automobile, of course, can go very nicely by way of Claiborne; but, if anyone is either unfortunate or fortunate enough not to own an automobile, it is a lot of trouble to get to Ocean City. I have heard various complaints from prospective customers. The proposed ferry, if it saves one hour's time, I should think would be considerably better.

Cross-examination.

The seasons at Ocean City seem to be increasing. The Atlantic Hotel and three or four others open at Easter and keep open until about November; whereas five years ago it was usually the Fourth of July until Labor Day, when all closed up. The greater part of the tourist travel to and from Ocean City is between those dates. Even now the road between Berlin and Ocean City is crowded with automobiles. It may be that mostly they are people living on the Eastern Shore but there are a great many foreign cars. The boarding houses and smaller hotels all open now by the 15th of June, and they close about the middle of September, with the exception of about half a dozen which keep open longer. There is a good deal of tourist travel outside of that period. But the bulk of it, of course, is between the middle of June and the middle of September.

Redirect examination:

The permanent population of Ocean City is estimated at eleven hundred at the present time. The winter population, those people live there all the year round.

Robert H. Matthews testified as follows:

[fol. 123] Direct examination:

My name is Robert H. Matthews, Cambridge, Md., fire insurance and real estate. My activities take me around the Eastern Shore counties in question. I am familiar with the territory all along the Eastern Shore of Maryland and Virginia and am in favor of the project before the Commission. I am a member of the Del-Mar-Va Association, which is composed of people all over the Shore, to promote the better interests and better conditions on the Shore. Its representation covers practically the entire Eastern Shore—the nine counties of the Eastern Shore of Maryland, Virginia and Delaware. I have heard this ferry proposition discussed a great deal on the Eastern Shore. Based upon my contact with the situation, I would say that the general sentiment toward this new ferry, below the Choptank River, is very favorable.

W. Laird Henry, Jr., testified as follows:

Direct examination:

My name is W. Laird Henry, Jr., Cambridge, Md., lawyer. I am a member of the Chamber of Commerce at Cambridge, which has heartily endorsed this ferry. A resolution was introduced in the Chamber and was unanimously adopted by the full chamber. I am familiar with the purpose and activities of the Del-Mar-Va Association in a general way. I am not a member of it. They meet in regular session in Salisbury. I know that the Association, through its President, has sent a telegram to the Interstate Commerce Commission in Washington endorsing this ferry.

CARROLL E. BOUNDS testified as follows:

Direct examination:

My name is Carroll E. Bounds, lawyer, Salisbury, Md. I am not here in any official capacity at all, but only as a resident of Wicomico County. I am heartily in favor of anything that will bring closer together, by distance or by [fol. 124] time, the Eastern Shore of Maryland and the Western Shore, also the Eastern Shore of Maryland and the City of Washington. I am more or less familiar with the farming industry generally in that section. I know that we ship a great deal of perishable produce and truck to this city. I know that our facilities at present are rather unsatisfactory. I know that a great many of our shippers in Somerset and Wicomico Counties oftentimes drive their trucks all the way round up the Delaware road and around by Elkton in order to get to Washington with their produce, and they oftentimes drive all the way back the same route. They sometimes use the Claiborne Ferry.

Now, I am not familiar altogether with the distance that this proposed line will eliminate, but I understand it is very considerable. I think, as I said, that anything that will eliminate that time or distance between the two Shores is very desirable from our standpoint.

I also might say that our section down there is growing very fast—Wicomico County and Salisbury particularly. And I think that better ferry service, quicker ferry service, between those two points in question would be of very great benefit to us.

Now, of course, I am interested in anything that will open up our section down there to other parts of the State, as well as to other parts of the country. I think it would be of very great benefit to us.

I might also say that I think the traffic between the two Shores is increasing to such an extent as to justify additional ferry service. I have heard this proposition discussed by residents of Salisbury and have heard no opposition to it.

JOHN B. GRAY, JR., testified as follows:

Direct examination:

My name is John B. Gray, Prince Frederick, Md., lawyer. I think undoubtedly this project will be a great public

convenience so far as the lower end of the State of Maryland and the lower end of the Eastern Shore are concerned. [fol. 125] It will make the two sections of the State in very much more convenient contact. It will eliminate, from my town of Prince Frederick, for instance, at least 50 miles of travel in reaching the town of Cambridge and a somewhat less distance in reaching other towns on the Eastern Shore, such as Salisbury and Ocean City.

The two parts of the State are separated by the Chesapeake Bay, but from time to time we do have to have contact with people across the Bay; and any direct method of getting there is a very desirable improvement.

I think, further, that the proposed ferry would be a very substantial benefit to the people on the lower Eastern Shore, in so far as it will give them a very much more direct access to the Washington market. Prince Frederick is about 14 miles from Chesapeake Beach and about the same distance from the nearest station on the Chesapeake Beach Railway, which is Owens Station. I have discussed the new ferry with people in my county and other southern Maryland counties and have encountered no opposition to it.

HERBERT HEARN testified as follows:

Direct examination:

My name is Herbert Hearn, Cambridge, Md., wholesale hardware. My business carries me over the entire Eastern Shore of Maryland, Delaware and Virginia. I am somewhat familiar with the conditions along the Eastern Shore. I have lived there all my life. I have heard this new ferry project discussed in Cambridge and all I could hear was very favorable. I have heard no opposition to it. This proposed ferry would benefit the Eastern Shore, with particular reference to Cambridge. Cambridge at the present time is a terminal for a railroad and also for the state road system, except some county roads which run down through the county. This would lay us on a direct line of traffic between the Western Shore and the Peninsula—I might say Salisbury, Ocean City and other towns on the southern Peninsula, and Washington and Baltimore.

[fol. 126] J. M. GIGNILLIAT testified as follows:

Direct examination:

My name is J. M. Gignilliat, Manager, Tour and Travel Bureau of the American Automobile Association, Washington, D. C. In connection with my official position with the Three A's, I have to familiarize myself with tourist and transportation conditions by highways radiating out of Washington. I am familiar with the traffic and highway conditions between here and the Eastern Shore of Maryland. I am familiar with this project which is now before the Interstate Commerce Commission. The interest of our Association is the interest of the motorist and the means of transportation for getting motorists from one point to another.

Our main job in my department is to direct people to places to go to and what to see and do when they get there.

The Eastern Shore is a portion of the country which is of great interest to the people of Washington and surrounding territory and also to people who come to Washington from other points.

At the present time we have found that the ferry facilities for taking people from Annapolis to Claiborne are somewhat limited, especially on busy days during the summer—not so much the days of the week as holidays and week-ends. This had been brought to our attention by members who come in there and ask us to make reservations with the Ferry Company when they go from Annapolis to Claiborne and return. That, in itself, would tend to show that the means of transportation are somewhat limited at times. Take also the Annapolis highway, leading from Washington to Annapolis. That takes many people there who have no interest in going over the ferry; and that puts many people on the road. And, if they have a set schedule which they have to make, of course, that all has a bearing on what time they have to leave Washington; and for that reason they have to leave somewhat earlier than they might want to.

[fol. 127] In going from one place to another, of course, the greatest interest of the motorists would be in time-savers—how far the different points are and the means of getting across such places as streams and rivers.

We have had people come into Washington from other places, especially in the summer-time, planning to reach bodies of water and inquiring of us where the nearest place to Washington would be for swimming, boating, and so forth. That has been rather hard to answer up to the present time.

Take even the New Jersey resort of Atlantic City. That has been as favorable as any, and that is only 180 miles from Washington. They have a ferry up there which runs every 15 minutes, and it is only about 10 minutes across.

You can figure, as conditions are now, on devoting about the same amount of time driving on the roads to put a person in Atlantic City or in Ocean City. For that reason we have been having to give both places as alternate places where people could spend the week-end.

Such places are drawing people from the South and from points in West Virginia and the West. Take Virginia Beach, with a bridge, 210 miles from Washington. Driving all the time, they can get there, counting the amount of time they have to spend on the ferry here, in about the same time it now takes to get to Ocean City.

With the difference in mileage and running time across Chesapeake Bay to the Eastern Shore, the situation is such that I think the proposed ferry would be a great asset to people wishing to cross to the country on the other side.

At the present time there are many historical points of interest across on the Eastern Shore, which people do not go to visit right now on account of the somewhat limited ferry facilities and also because of the time it takes—an hour and a half across and as much back, which is three hours.

In the summer-time a ride on the water is very delightful [fol. 128] and cooling to a motorist who has driven a number of hours. They want to get where they are going and spend some time on the beach. The proposed ferry, being an hour against a hour and a half on the other ferry, does shorten it. And that would be a big help to the motorist. The saving in time would be equivalent to about 20 miles, at the present rate of speed. This proposed ferry route will make a desirable highway to the Eastern Shore which needs better ferry facilities than what it now has. I am familiar with the ferry operation at New Castle, Del. There are two ferries there, seven miles apart. I do not know

whether there are two companies or whether they work jointly. I notice that they use the same literature, though, in puttng out a ferry schedule.

Cross-examination:

I do not make any independent estimate of the difference in time across Chesapeake Bay made by the present operation of the Claiborne-Annapolis ferry and the proposed operation. That is just from listening to the testimony and hearing what has been stated. I just assumed that from the testimony given here.

Q. So if, as a matter of fact, there is no material difference between the length of the present trips, to that extent it would alter what you have just said about the speed with which you can reach the Eastern Shore?

A. Yes, sir. I am familar with the proposed ferry from Annapolis to Kent Island. I have heard that it will mean only a trip of 6½ miles across Chesapeake Bay.

Q. Now, Mr. Gignilliat, after that new operation is started, won't travelers by that route be able to reach Ocean City in considerably less time—I mean motor vehicle travelers—than they would over the proposed operation by the Chesapeake Beach ferry?

A. I do not think I can answer that question fully, because I sent a car over the proposed road down to Chesapeake Beach last week; and they were laying concrete, and we were not able to continue over the road which they were [fol. 129] supposed to be laying. The difference in mileage between Washington and Chesapeake Beach on the one hand and Washington and Annapolis on the other is approximately four miles. The Kent Island ferry will put you higher up, and you will have 15 to 20 miles further to travel from Washington to Ocean City.

Q. But it is true that you travel much faster on land than you do on water; isn't it?

A. These roads which run from Kent Island to, say, Salisbury have not been logged or any figures given; but, if it is 20 miles longer, I cannot see how it would put you there any quicker.

Q. What is the average rate of speed which you use in computing these times between places?

A. I would say 35 miles an hour.

Q. You would?

A. Yes, sir.

Q. Then, if it were 20 miles difference, that would be less than an hour; wouldn't it?

A. Yes, sir.

Q. In fact, not much more than half an hour; is that right?

A. Yes, sir.

Q. Then, on the other hand, you would be comparing a water trip of 6½ miles against a water trip of more than 15 miles?

A. That is true.

Q. Which is more than twice the time on water; is not that so?

A. That is true, as the mileage is represented now.

Q. With those estimates, would or would you not say that the time between Washington and Ocean City, for example, could be made just as quickly or quicker over the proposed route of the Claiborne-Annapolis ferry than over the proposed route of the Chesapeake Beach ferry?

A. If the traffic increases much more on the Annapolis boulevard, you cannot make any time on it. And right now people travel 9 miles further to avoid that Annapolis boulevard.

[fol. 130] Q. Then, you think that would play some part, and maybe a material part,—the increase in traffic on the Washington-Annapolis road?

A. Yes, sir.

Q. That is, the Defense Highway?

A. Yes. I think that, if you put in these facilities for travel across the Chesapeake Bay, the traffic over there will double itself in a couple of years. I know that people who want to go over there now and spend as much time as they can on the water will turn away and go elsewhere, rather than stay under the present circumstances. That travel takes up about five months of the year. When the days are long enough, from now on,—they are coming in right now and showing interest in going to the beaches already. We have made reservations for people up at Atlantic City right now. Easter is one of the big seasons, and at Atlantic City it begins about a week earlier.

Q. But I am talking about Ocean City.

A. They haven't the facilities to get people there now. That is the reason they do not go there.

Q. You think this proposed service would be a great convenience to the people of Washington?

A. I think so; yes, sir.

Q. And to tourists who come from the South?

A. Yes, sir.

You see, Washington has a population of thousands of people who do not live in this vicinity permanently. They come here as Government workers from other places. They do not stay in town, and they want places to go to. That is what we have to furnish them with; and we are, of course, interested in getting people where they want to go.

Q. And this would be an added facility, of course, for those who are closer to Chesapeake Beach or to the territory which is served by Chesapeake Beach?

A. Yes, sir.

[fol. 131] Q. Than, of course, if would be to those who do not live in that territory?

A. Yes, sir.

Redirect examination:

We receive information from time to time about all the highways around here. We have telegraphic service on every road in the country. The Defense Highway is a very crowded road, and it is very narrow. I would not like to express myself any further on that point. Counting from Washington, I would say that Ocean City was about 111 miles by the new ferry as against 133 miles by the Claiborne ferry. In getting to the Annapolis ferry, you have to drive practically through Annapolis to get to that ferry. I do not know where the landing will be at Chesapeake Beach, but there is no town that you have to go through there. Most of the crowding of the streets in Annapolis is due to the presence of tourists and strangers. A great many go there to see the Academy.

Examiner Molster: If that traffic congests the streets of Annapolis, won't it congest the road to Chesapeake Beach?

The Witness: To Chesapeake Beach? Yes, sir; to some extent it would.

FRANK ROBBINS testified as follows:

Direct examination:

My name is Frank Robbins, Cambridge, Md., life insurance and real estate. I have lived in Cambridge all my life. That has been my home. I have been away, of course, a month or two at a time. I went to work for the Red Seal Oil Company in Baltimore in March, 1914, and in 1915 I was made Eastern Shore manager, taking in all the Eastern Shore Counties from Cecil down to Cape Charles, Virginia.

Since 1922, I have been associated with the Equitable Life of New York and on specialty work in other counties, working with other agents. My activities take me pretty well over the Eastern Shore. I am a director of the [fol. 132] Chamber of Commerce at Cambridge. The people of Cambridge first began to think about an additional ferry route across Chesapeake Bay, I think about in June, 1928, was the first time that I discussed it publicly with anybody —I might say privately, with two or three people. That private discussion was to the effect that I took it upon myself, after being sure of the bankers and real estate men that I had confidence in,—I took it upon myself to write a letter, as filed, to the business men of Dorchester County. I wrote to bankers, farmers, mechanics, real estate men,—in fact, I should say men in all walks of life. In the last five or six years—and I wish to refer to the fact of different organizations being formed—there has been a movement for better transportation and better industrial relationships for the whole peninsula. There have been more Chambers of Commerce, more Rotary Clubs, more Kiwanis Clubs and more Lambs Clubs formed on the Del-Mar-Va Peninsula in the last ten years than in the past one hundred years. The people over there feel that they were not getting all that was coming to them in the way of transportation. We knew that we did not have sufficient outlets for our products. A company was organized for the purpose of constructing and operating a ferry. As the record shows, on September 4, 1928, these letters were sent to the business men of Dorchester County, asking them to attend a meeting in the banquet room over Robbin's restaurant to discuss in detail the possibility of establishing a

ferry line from Cook's Point or thereabouts, to Chesapeake Beach, Calvert County.

Q. Did that organization take the form of an actual company?

A. That organization approved it at that meeting; and to show that the organization did approve it I would like to make this statement: that, as to all present, we knew that the responsibility for the investigation should not fall on the Chamber of Commerce or the Rotary Clubs, as is usual. So I called on each man, if he cared to express himself from the floor relative to the proposed line, to do so, and each person who wanted to do so stood on the floor [fol. 133] and discussed it from a map drawn up by a local engineer, Mr. Guy F. Bryan.

Now, to determine whether those present were with us 100 per cent or not, I asked every man in the room to walk to the table and lay on the table a stated amount, in cash or check, to help defray the expense of an investigation to find out, in the first place, whether the line should be established and whether we could find somebody big enough financially to establish and give us this line; and 100 per cent of the people in the room walked to the table to lay money on the table to make the investigation with. After that was done, we moved at that meeting that a secretary and treasurer be appointed. That was done. It was moved that a company be formed, and five or six men formed a corporation known as the Cambridge Ferry Company, and the incorporators naturally named the first Board.

I would like to give an illustration of the different classes of people who are on the Board of Directors of the Cambridge Ferry Company. They are as follows:

Frank Robbins, myself, President. I will give the capacity in which they serve.

Mr. Herbert Hearn, wholesale and retail hardware, Vice President.

Mr. Robert Tubman, retired shoe manufacturer from Baltimore City, and a resident of Dorchester County for fifty years.

Mr. Roy Melvin, produce.

Mr. Howard Spedden, canner.

Mr. Sidney Henry, Treasurer. He is a real estate man.

Mr. Franklin Seward, canner.

Mr. Samuel W. Linthicum, canner, lumberman and banker.

Mr. Robert Matthews, banker, real estate and fire insurance.

Mr. Scott Meekins, Manager and Treasurer, Cambridge Wholesale Grocery Company.

Mr. J. Davidson, retired.

Mr. R. Ryder, retired.

Mr. Clement S. Henry, real estate.

[fol. 134] The Board was formed, and we met. Before we, as directors of the Cambridge Ferry Company, would go further, we decided to call a meeting at Salisbury, Wicomico County, Maryland, to discuss this think publicly with the leading business men of Dorchester, Wicomico, Worcester, Somerset, Accomac and Northampton Counties.

Then the letters were sent, and representative men attended this meeting held in Salisbury, Md., December 13, 1928.

At that meeting different representative people talked and discussed this plan as fully outlined, and this meeting as a body endorsed a ferry route from Trippe's Bay, Dorchester County, to Chesapeake Beach. I had a map there showing it from Chesapeake Beach and Fairhaven, because at that time we did not know whether we would be able to land at Chesapeake Beach or Fairhaven. We made application to the Maryland Public Service Commission for a certificate of public convenience and necessity. We had the Public Service Commission postpone the time for hearing indefinitely, due to the fact that we could not at that time show the proper financial set-up, and we knew it would be silly to ask them for an authorization of the line when we could not financially uphold it.

Q. It was entirely a Bay to Bay proposition?

A. Yes, sir. All the people I come in contact with are mighty anxious to have another transportation system to the Eastern Shore of Maryland.

Relative to our own people and the Salisbury people and the Ocean City people, we feel that we would like to have a direct line, so that, if we wish to go to Baltimore, Washington, Richmond or any other point,—we can do so by both a saving in time and a saving in miles and, last but not least, a savings in dollars. The distance by highway from Claiborne to Ocean City is 98 miles. The distance from Cambridge by highway to Ocean City is 62 miles. We

fellows in Dorchester County can come to Washington and make a round trip practically in the time we can leave by the Claiborne Ferry Company and come to Washington.

[fol. 135] EDGAR MORRIS testified as follows:

Direct examination:

My name is Edgar Morris, President of the Morris Sales Company, 1903 G Street, this city, wholesale distributors of gas and electric appliances and representing the Pittsburgh Water Heater Company and the Roberts-Anderson Stove Company We distribute our products along the Eastern Shire. We could use this proposed ferry in making less then carload shipments to the Eastern Shore, to very good advantage, because we oftentimes make less-than-carload shipments to Crisfield, Salisbury and places like that. We have warehouses here in Washington. We have traveling represenatives who work out of Washington and travel that territory regularly by automobile. I am in favor of this proposed ferry route.

ARTHUR C. SMITH testified as follows:

Direct examination:

My name is Arthur C. Smith, Vice President and General Manager, Smith's Transfer & Storage Company. I am Chairman of the Transportation Committee of the Washington Chamber of Commerce. I am familiar with the transportation conditions to and from the Eastern Shore — Maryland, having had the pleasure of going to Ocean City each year for the last ten or twelve years. It has been a pleasure for the family, but not for me. I am familiar with the proposed ferry project which is now before the Interstate Commerce Commission. I am in favor of it and so is my committee. As a committee and as the Chairman of the Committee, we believe that it will open up business relations between the Peninsula and Washington, so that we can get truck and produce in a very much shorter time and at very much less expense. I do

not regard the present mode of ingress and egress to and from the Eastern Shore as satisfactory. This proposed ferry route will improve those conditions very materially. It will shorten the distance and shorten the time. It would [fol. 136] make my own summer outings at Green City very materially beneficial to me, in the way of going down to see the family. I figure that I can get down there in five hours now, and it used to take me practically ten hours.

DORSEY W. HYDE, JR. testified as follows:

Direct examination:

My name is Hyde—Dorsey W., Jr.—Secretary of the Washington Chamber of Commerce. I keep in approximate account of the number of annual tourists to Washington. The only complete survey made was that by the engineering firm of McClelland & Junkersfeld.

On the basis of that survey, which included only the larger hotels, the well known hotels, and the number of transients coming to those hotels, the estimate figures out, for the last recorded year, at 1,800,000 tourists to Washington. That total was for 1925. That being, as we considered, conservative, we put the same estimate today at somewhat less than 2,000,000. That does not include rooming houses, of which there are a great number in Washington, private boarding-houses, apartment hotels and many other establishments which take care of transient people. My personal opinion is that last year about 5,000,000 tourists came to Washington. I am familiar with the proposed ferry project which is now before the Commission. I regard that project as decidedly an essential thing to Washington and the Eastern Shore of Maryland. I would like to state, if I may, briefly, my reasons for that belief. I have mislaid my notes, but I will talk without them.

In any large metropolitan city, its success from the standpoint of business development depends very largely upon its ability to build up a trade area around that city and to enter into friendly and equitable trade relations with such surrounding area.

Washington has been very much handicapped in that respect in certain sections surrounding its natural area,

and largely so by reason of the very nature of the city. [fol. 137] Being a Federal city, there are certain limitations on manufacturing. Those have been somewhat overcome. We now produce here over $100,000,000 a year of manufactured products. We have some 600 industrial plants in this city.

They have been handicapped somewhat, except north and south. To the east and west, facilities have not been equally good. The Potomac River is a natural highway, but it has only recently been open to traffic on a large scale. We cannot handle traffic to the extent we might under proper circumstances.

Further to the north, the United States Engineering Department has developed a plan for power generation and canalization of the Potomac. That has been held up.

Now, our main dependence is on roads in those two sections; and the one handicap to roadway traffic is the lack of facilities over the numerous waterways. Washington today has only two bridges connecting it with Virginia, although in most countries abroad you will find five or six in a like situation.

The Eastern Shore is perhaps one of the richest agricultural territories within reasonable access to this city, and one which should be included in our natural trade area.

We are absolutely cut off from any connection with the Eastern Shore, except through some such means as is proposed here today. I think most of the business men of Washington feel that such a ferry would be of great advantage, not only to the people on the Eastern Shore, but to the people of the District of Columbia.

We feel that the figures as to the contemplated probable use of the ferry are extremely moderate. We feel that the residents both on the Eastern Shore and on the Maryland side of the Chesapeake Bay would make use of that ferry to an extent that cannot be accurately estimated now, because the ferry does not exist. We feel that that section would become a natural playground for innumerable groups of Washington people, who would go over there and buy land and establish themselves there and use it for summer [fol. 138] recreation.

We feel also that the number of tourists who come to Washington is far beyond any estimate which has been

advanced as yet. And they would, we believe, use this route quite largely.

The number of tourists coming to Washington each year is rapidly increasing, and they are giving more attention to motoring around through the nearby sections of Maryland and Virginia.

About ten years ago I picked out one of the main highways and went three miles and ended in mud; That was not only occasionally so, but frequently the result which the tourist found when he undertook to make a trip. But, with the new road now being built and with improved ferry transportation, we feel that the tourist travel will materially increase.

H. V. Hayghe testified as follows:

Direct examination:

My name is H. V. Hayghe, bookkeeper and office manager of the W. Charles Heitmuller Company, 923 B Street Northwest, Washington. The company is in the wholesale fruit and vegetable business. We secure part of our supply of fruits and vegetables from the Eastern Shore of Maryland and Virginia. The trucks now use the present ferry service from Claiborne over to Annapolis and the road from Annapolis to Washington in bringing those fruits and vegetables to our store. We sometimes have difficulty with that ferry service, in so far as concerns overloading of the various boats when moving on the schedules on which they now operate, which necessitates a hold-over at times of truckloads which should have been here earlier in the morning and caused late delivery. We have found the ferries taxed to capacity at various times. I am familiar with the proposed ferry which will run from Trippe's Bay to Chesapeake beach, Md. I regard that as a feasible route from the Eastern Shore. Of course, we could not, as far as we are individually concerned, authorize the shippers to make use of that route, but we could suggest it; and I really believe [fol. 139] it would meet the demands of the shippers and facilitate the movement of stuff to this market. We cannot dictate his handling or route when we handle his goods. I feel that the proposed route will be a shorter route. We buy very little on the Eastern Shore. We handle most of

the shipments from that territory on consignment. They are shipped to us on consignment, to be sold for the shipper's account. We handle considerable goods fom the Eastern Shore. I feel that there is enough goods produced on the Eastern Shore to warrant another ferry route. I base that opinion from our own records of tonnage and the number of truckloads which we handle during the season of the various commodities shipped.

We have had for sale at our store as many as ten or twelve truckloads of produce of various kinds in a day. Our season runs from around about the middle of April until possibly the middle or latter part of July before there is a close-down. Or course, there is some movement all the year round; but we can approximate it as an average of three or three and a half truckloads, containing possibly two and a half or three tons per truck, every day for the whole season. Of course, some days are much heavier than others. In the movement of this produce, speed is very important to us. That is on account of the very perishable nature of many of the shipments we handle—for instance, asparagus. That is picked and cut in the evenings—the nights—and loaded to be sent to market for the early morning market trade; and, if we should not meet the market on account of delay in the ferry service, it would necessitate carrying those goods over, possibly, until another day's market, which greatly deteriorates the condition of the goods, as well as their value. When we sell those deteriorated goods, we transmit less money to the farmer than if his goods come in in good condition. So his receipts depend upon the amount of money we get for his goods. His receipts and revenue depend upon the condition in [fol. 140] which we receive the goods and the amount that we are able to realize for them. It would be in his interest to have the goods come in here in good condition.

Cross-examination:

Most of the trucks now come through the present ferry service from Claiborne over to Annapolis. If the new ferry service is established, that possibly would not use that route any more, speaking for the lower section of Virginia, because it would expedite the movement to such an extent that it would be more to their advantage to use the new ferry service instead of the old. To the extent that

the new ferry would gain by that operation, to the same extent the old ferry service would lose. I do not know what effect that might have on the present operation of the existing ferry service.

By Mr. Perlman:

A. If there were service between Kent Island and Claiborne—and additional service to the one now established—that would cross the Bay every half hour, would that be of any assistance to the situation here in Washington?

A. At what periods would they cross, sir?

Q. Every half-hour.

A. At every half-hour?

Q. Yes.

A. And they would land on this side where?

Q. At Annapolis—the same place they do now.

A. I don't think so, on account of the congested areas which they would have to come through to meet that point of origin.

Q. As I understand your testimony, the truckloads which you now receive come over the existing ferry service?

A. They do, yes.

Q. And, if there were a ferry service in addition to that one, which would start at a point higher up on the Eastern Shore, on Kent Island, and reach Annapolis every half-hour, would not that be of some assistance?

A. That would take care of the northern points to a great extent; but it would not affect the lower Peninsula in any way, I think.

[fol. 141] Q. It is true, is it not, that you can travel faster on land than you can on water?

A. Yes; I imagine you can.

Q. And, if it were true that they could reach the upper point and cross the Bay in a shorter time than they now do, would that not be of some assistance to the Washington situation?

A. It would be; but I do not believe that service could be maintained to make quicker delivery than the proposed plan that is being discussed at the present time, on account of the congested areas in the small towns through which you have to come. You know, the Virginia laws are very rigid as to speed, and I do not think that would expedite

the handling of goods to any extent at all. I do not think it would be as good as the proposed service of the Chesapeake Beach ferry. I don't know if it would be an improvement over the present situation. Of course, I am not exactly familiar with the lay of the land in this section—that is, as to every point down in that section. But I know that the existing ferry has not given the service we really should have gotten in order to move the stuff as fast as possible. But, if there was a half-hour service and they could make up the additional time by land travel on the other side, of course, it might work to our advantage.

Redirect examination:

I have an idea where Kent Island is.

Examiner Molster: What is the ideal time for delivery of produce at your establishment in Washington?

The Witness: I should say around about eleven or twelve o'clock at night and one o'clock in the morning.

Examiner Molster: It would not be necessary that the traffic move over to Chesapeake Beach at night in order to get there at that time?

The Witness: Not necessarily. If they could begin the movement sufficiently early in order to reach us at that time, it would be perfectly satisfactory if we received them at night.

[fol. 142] Examiner Molster: You do not understand that there is to be such service by this ferry?

The Witness: I do not understand that; no, sir.

J. Spence Howard testified as follows:

Direct examination:

My name is J. Spence Howard, civil and consulting engineer, Baltimore, Md., and Saint Marys County, Maryland. I have been Chief Engineer of the Chesapeake Beach Railway since 1910. So far as I know, during that time, I have handled all the construction work that they have undertaken. I have worked in connection with this projected ferry now under consideration. I made a complete survey of the property on the Eastern Shore and the property on

the Western Shore, and prepared plans and estimates on the cost of the piers and wharves and the necessary expenditure on both sides of the Chesapeake Bay. I also prepared maps showing the distances between the various points. I prepared the estimate of cost from actual experience in doing work of this kind in this particular section; that, to the best of my knowledge, it is accurate and complete and, I think, will cover the necessary work to put in operation these ferry boats from one side of the Bay to the other. I am prepared to vouch for the accuracy of Sub-Exhibit No. 17. I also prepared an exhibit for presentation here, which is marked Sub-Exhibit No. 2 to the questionnaire return, consisting of a map of distances. We checked these distances in every way possible. We even had them checked over on the state road maps by automobile, and, as far as I know, they are as accurate as it is possible to obtain them.

By Mr. Ames:

Q. How far will it be from the entrance of the Annapolis ferry to the entrance over the proposed ferry?

A. About 30 miles.

Q. Now, do you know how far it is from the Claiborne ferry entrance to the one we propose on Trippe's Bay?

[fol. 143] A. It is 47-½ miles from Claiborne to Cambridge. It is between 11 and 12 miles from Cambridge to Hudson, the terminus of our ferry on Trippe's Bay. It is 15.75 land miles or statute miles, and 13.7 nautical miles across the Bay in connection with the proposed ferry.

Cross-examination:

I did not assemble any estimates of the cost of the boats that this ferry company proposes to use. That is mechanical work, and I did not have anything to do with that estimate whatever. I had all the construction work and the building of wharves and piers, on which I made the estimates, but not on the boats.

Redirect examination:

I am familiar generally with the traffic conditions in the City of Annapolis, in so far as motor vehicle traffic is concerned. The streets in Annapolis are exceedingly narrow.

There is no parking space or landing space at the ferry. They have to park up the streets. At times the congestion is such that people going there cannot even get on the ferry.

HUGH HORN testified as follows:

Direct examination:

My name is Hugh Horn, Washington, D. C., consulting engineer. I prepared a statement of estimated cost of operation per annum, which is designated as Sub-Exhibit No. 9 in this questionnaire return. In the way of construction and railroad engineering and some of this work, I have had about 40 years' experience. I have made some similar calculations in other parts of the country. I am prepared to vouch for the accuracy of this calculation to the best of my knowledge and ability.

Cross-examination:

Mr. Fox testified that the horsepower of the engines he would use in the boats was twenty-four hundred. He meant twelve hundred horsepower each providing for two screws. [fol. 144] On the information they gave me as to what those boats were, I made up this statement. I estimated $5,000 a year for maintainence and incidentals, by taking the customary figure, of 10 per cent of the operating expenses on new equipment. I do not know what the actual experience has been in operating ferry service across the Chesapeake Bay. I made no attempt to find out what the actual experience has been over those routes by the ferry companies. These figures are based on the ferry boat that Mr. Fox proposed this morning, allowing for the difference in speed; that is, the power is based on that, allowing for the differences in speed. None of these figures are based on actual experience of any ferry company. The cost of the crew is taken from the Cambridge & Philadelphia ferry, and the cost of fuel, of course, is taken according to the horsepower is ample.

Examiner Molster: Does the estimated cost of this project include an item for dredging?

The Witness: Yes, sir.

Examiner Molster: Have you in your estimated operating expenses included any item for preserving the channel?

The Witness: No.

Examiner Molster: In your opinion, it won't be necessary to dredge and re-dredge from time to time?

The Witness: There is considerable difference of opinion on that. That has not been considered. There is no allowance in exhibit No. 8 for depreciation. That was taken care of in the financial document, I think.

Mr. Perlman: The only table I see here (indicating) says "excludes depreciation", in exhibit No. 8.

Mr. Fox: There is no depreciation including in this table.

A. It is just an operating statement. Depreciation in terminals depends greatly on your class of construction.

By Mr. Perlman:

Q. Did you prepare any of these other exhibits, Mr. Horn?

A. Yes. I think I prepared an itemized statement of pier [fol. 145] construction. But Mr. Howard handled that—the estimate on it.

Q. He was an engineer. That is the reason I did not ask him about that. That is Exhibit No. 10. Did you prepare that?

A. No; I did not have anything to do with that.

J. Spence Howard was recalled and testified further as follows:

Examiner Molster: Mr. Howard, you have been previously sworn in this proceeding.

Will you give us your opinion as to the likelihood or necessity of the proposed 12-foot channels, to be established in connection with this operation, being kept open by dredging and re-dredging from time to time?

The Witness: I have been into that pretty thoroughly, and I consider that at Chesapeake Beach we have enough depth not to require re-dredging. I base that on the fact that we rebuilt the old pier which we had at Chesapeake Beach some six years ago. Steamers used that pier, and it was never necessary to do any re-dredging. For a distance of 12,000 to 15,000 feet it was marl and sand, and that does not refill.

The about 150,000 yards of dredging included in my estimate at Cheasapeake Beach is, I think, very ample to cover all the dredging which would be necessary there. I do not believe there would be any dredging there for a long period of years.

Now, on the Eastern Shore my estimate includes an additional 50,000 yards of dredging. I did add 50,000 yards because of the possibility of trouble for a year or two. I also included sheathing for a short distance where we enter the mouth of Covey Creek. That is one point where I could get information that it would be necessary to do that kind of work. I talked with some of the Government engineers, and they pretty well agreed with me.

Examiner Molster: Then, do I correctly understand that you have included in the original cost an expense for [fol. 146] re-dredging within the next year or two?

The Witness: On the Eastern Shore I did—50,000 yards. In other words, where the water at the present time is low at the entrance to the creek.

Examiner Molster: Along the west shore your dredging will come in water not much more than two or three feet deep; will it not?

The Witness: No, sir. The water where we start dredging is about 8 feet.

Examiner Molster: And in your study of this matter have you given consideration to the action of the tides and currents in the Chesapeake Bay?

The Witness: Yes, sir. I judge of that by the old pier. I do not think you can get any better example than that. The old pier has been there for a good many years. It used to be up at the railroad station, where we propose to build this pier. I helped to re-build that pier in 1923, and drove new piles. We never had occasion to re-dredge it. We had steamers from Baltimore that used that pier and it is pretty near half a mile long. The proposed pier is longer than the one now existing there.

TESTIMONY ON BEHALF OF INTERVENER

JOHN M. DENNIS testified as follows:

Direct examination:

My name is John M. Dennis, Vice President, Claiborne-Annapolis Ferry Company and President of the Union

Trust Company of Baltimore. My address is Riderwood, Md.

Q. The Claiborne-Annapolis Ferry Company is substantially the child of the State of Maryland.

In 1916, after a number of financial failures in the operation of a ferry between Annapolis and Claiborne, the Governor of Maryland offered the sum of $50,000 as a bonus to any corporation that would inaugurate a regular ferry service between Claiborne and Annapolis. This proposition [fol. 147] was accepted by a New York syndicate, and they raised the sum of about $130,000 in money, out of which they purchased a boat named the Emerson C. Harrington.

This boat had a carrying capacity of 40 automobiles and probably 500 passengers. It operated for a while. People did not like it. And what the public don't like, they won't use.

So that went into—not quite insolvency; but they turned the boat over to Governor Harrington and told him he might make out of it what he could.

At that time there was a mortgage still resting on that boat of, I think, $48,000, and as against that mortgage there was a continuing state subsidy of $18,000 a year.

Governor Harrington came to me, as President of the bank, and asked me if I would not help out in the ferry situation; and, after looking into it for quite a while, I told him that I did not believe the public would use a boat of that type, which was a side-loader and discharger, and it was very inconvenient for an automobile to go on the boat, and dangerous for trucks; but that, if he would go further and build a boat that was a boat, we would help out.

This resulted in the ferry company building what is now the "Ritchie." As to that boat, from the time it got on, business began to increase, and subsequently we have bought or, rather, built the "John M. Dennis."

The two large boats we have in operation now will carry about 90-odd automobiles and about 1500 passengers. They make six round trips a day during four or five months of the year between Annapolis and Claiborne.

But we have found, in connection with the operation of those boats—and with no competition or suggested competition—that an hour and a half on the water is too long; that time is more essential in transportation than distance. And you cannot run those boats—even the "Dennis", which

I think has about eighteen hundred horsepower, I do not [fol. 148] think can make much better time than an hour and twenty minutes between Annapolis and Claiborne.

This has caused our expenditure—not all completed as yet—of $150,000 or $160,000 digging into Kent Island and making landing places over there, which will make the distance about 6-1/2 or 7 miles.

This summer we expect to establish a service of every hour on the hour, and next summer we expect to run every half-hour on the half-hour.

There is great economy to us in the shorter distance, because one boat performs all of the functions of the two boats. It doubles our carrying capacity. I might say that these carrying capacities that I will read to you are determined as follows:

Passengers, the number permitted by Government licenses issued to the boats. Vehicles, the number that practice has shown that the vessels can reasonably carry. In rush periods each vessel has actually carried from five to nine more cars than the figures used.

Taking our service now the maximum carrying capacity with the present equipment, six round trips a day, we can carry between Annapolis and Claiborne in a year 431,430 automobiles and 7,446,000 passengers.

Now, between Kent Island and Annapolis, with the same vessels we can carry 862,860 automobiles and 14,892,000 passengers.

Now, between Annapolis and Claiborne and Annapolis and Kent Island, as per schedule proposed upon completion of the Kent Island terminal, the "Harrington" and the "Dennis" running to Claiborne and the "Ritchie" to Kent Island, the total carrying capacity would be 600,000 automobiles and 10,074,000 passengers.

This situation from a traffic standpoint is a very peculiar one. This Eastern Shore traffic all runs into a dead end. This whole business is composed of Eastern Shore people who want to go over and visit somebody on the Western Shore or somewhere else, and people from somewhere else who want to come over and visit people [fol. 149] on the Western Shore.

There is no part of the traffic which we serve like that between Baltimore and Wilmington, which would carry on to Philadelphia and other places. When you get over

here, you go to any one of these cities or places, and there you stop.

You have no chance, in all probability, of materially increasing the population on the Eastern Shore, because it is an agricultural and residential part of the country, where manufacturers will either float to Norfolk, on the one side, or go to Baltimore, on the other side.

And what these gentlemen amiably propose to do is to put competition into a traffic problem where the expected increase of population and business cannot occur, and where it is going to split up and divide the business that already exists. The four counties that they will work in, it is true, only contain 102,971 persons, according to the Census figures of 1920.

Q. And Mr. Fox, I think, stated that there were 60,000 people in the two Virginia counties which ought to be added on to give the total population of the territory served. Suppose you add 60,000 people. What would you then say?

A. I know of no expansion in area, territory or traffic that is possibly either for them or for us.

The history of this ferry business in Maryland has been, frankly, very disastrous financially. One line of boats that runs to Tolchester has been in operation, I think, for forty-five or fifty years. They have never done anything to make money. They are wearing out their present equipment, and when that is gone nobody has any anticipation that they will go into business again.

The Pennsylvania Railroad had a ferry service, as you know, for many years to Love Point. They operated that without extending the service in any way. And all the other boats in service on the Chesapeake Bay went into receivership.

Q. From where to Love Point?

[fol. 150] A. From Baltimore.

Q. And Love Point is in what county?

A. In Kent County, at the northern tip of it.

There were a number of rich men, including Mr. Michael Schloos, a millionaire, who started a ferry from Baltimore to Queenstown and lost every dollar they put into it. Every predecessor of the ferry company went broke.

Q. From what point to Queenstown?

A. They went from Bay View, which is about 10 miles south, near Bay Shore. At Sand Point they purchased three boats.

Q. And Queenstown is in what county?

A. Kent County. They went into the hands of a receiver about a year ago. They operated for about a year and a half; but the last part was irregular. They did not furnish regular service.

And the State of Maryland has recognized, apparently, the hard work you have to do in this ferry business, and they have appropriated, to every ferry line that will run, a thousand dollars a mile, which is based on the cost of maintenance of a mile of improved road in Maryland.

Now, I am vitally interested in this thing, in the way of loaning these people money. This ferry company is not out of debt. It owes, I think, about $280,000 on the last boat they built. I think it owed about $23,000 for the construction of this new terminal on Kent Island, and it will owe about $60,000 more before we get through with it. And it is a very hard thing to get banks to lend money on ferry property, because the financial history of them has not been inviting.

Now, to complete this picture and put this million dollars into this competing line, frankly, from a business standpoint I cannot see where it would do them any good, and it would do us tremendous harm.

In the first place, their figures, I am sure, are too optimistic. In their prospective set-up, as to number of cars, to be handled for the first year—which would — 1931—they [fol. 151] estimate that they will handle 91,250 cars. Well, if they did that, it would be more cars than the total business which we had in 1929, which was 76,352 cars, and in the year 1928 we handled 64,384 cars; and the increase in business was due to the putting into service of the new Diesel engine equipped "John M. Dennis." It was a new fad, and away it went.

In the matter of passengers, I see that for the same period they estimate that they will carry 182,500. We carried during 1929 269,950 passengers. We are perfectly willing to give you all our figures. There is nothing private about them. They all go to the Public Service Commission. And, if all of the estimates that they have made

here could be true, we would not have anything to carry, because you cannot create any business down there at all commensurate with your figures. It "ain't" there!

Now, there has been a good deal of emphasis put upon this matter of 24 or 25 or 30 miles difference in distance. I think the class of service, the frequency of service and the cost of service are of more vital effect on a community and on the business you will do than a question of 25 miles or even 30 miles difference in distance.

People do not want to wait for a boat. That is natural. When they get to Annapolis, they want the boat right there, and when they get to the other side they want to be discharged as quickly as possible. And the law of Maryland is that you can legally run an automobile 45 miles an hour.

But I think this is a very serious proposition to the public—not only to the Maryland people, but to the Washington people. We have spent a great deal of money in building or buying the most modern equipment we could purchase for this service. This last boat, the "Dennis," has Diesel engines, built all of steel, and would cost today $550,000 to replace. And I cannot see the public necessity for any additional equipment at this time.

Now, may I trespass just a moment more? This subject is not ever quiescent or quiet. The question of the Eastern [fol. 152] Shore business is like the flowers which bloom in the spring. It comes each year.

This year it was a bridge proposition. The Governor of Maryland has declared publicly that a bridge to the Eastern Shore must be built. The cost of this bridge is estimated at from ten to forty millions of dollars. It will be 8-3/4 miles over water—probably the most stupendous engineering effort of the kind ever attempted.

There were some dissenting people, who thought it was very foolish to do this. So he very wisely appointed a commission of eighteen men; and that is about as representative a body of men, I think, as can be gotten together in Maryland. Mr. Griswold is Chairman of it. He picked them up from different parts of the State; and it is a thoroughly representative body of men who have gone to work, with these instructions: to investigate thoroughly all features of cost and all matters appertaining to the interchange of produce, vegetables, and other business between

the Eastern Shore of Maryland and the Western Shore of Maryland and make a report on this situation.

I happened to look at the Wall Street Journal the other day—there is always something to worry the ferries—and found this little article. Here is the caption, "Flying Ferries." (Reading.)

"The Air Ferries, Ltd., is serving the business people and pleasure-seekers of California with an aerial taxi service across the Bay between San Francisco and Oakland, California. These flying ferries are gaining in popularity, for when the Bay route was inaugurated it had but three Keystone-Leoning amphibians. After being in operation for one month the company is arranging to add eighteen to its fleet."

So there is more transportation across the Bay.

I want to leave with you an impartial map, which is furnished by the State Roads Commission of Maryland and prepared by the Maryland Geological Survey, showing all the different roads and information of that kind. That map shows the existing service maintained by the Claiborne-Annapolis Ferry Company and the Kent Island Company also. That is delineated in red lines.

[fol. 153] (The map referred to was received in evidence marked "Intervener's Exhibit No. 10, Witness Dennis." This appeals here as Exhibit No. 10.)

Since 1916 and up to the present time, the only dividend paid by the Claiborne-Annapolis Ferry Company was one dividend amounting to a total of $15,000.00. Outside of that, it has never distributed one dollar in money to the owner of any stock or security of the company, except its interest-bearing securities—mortgage notes. The ferry that exists between Baltimore and Tolchester also receives a subsidy from the State. The ferry company from Bay Shore to Queenstown, which went into the hands of a receiver last year, also received a subsidy from the State. The Claiborne-Annapolis Company gets a subsidy of $18,000.00 a year, and an additional $3,000.00 for something which I do not know anything about; but their total subsidy is eighteen and three, being twenty-one thousand. The service to Kent Island will begin May 15th. This 1930 season we will furnish a service down there every hour on

the hour. Next season we hope to furnish service every half-hour on the half-hour. The total carrying facilities offered in the year 1929, by the Claiborne-Annapolis Ferry Co., based on the actual number of trips made by each vessel, were as follows: 216,445 automobiles and trucks and 3,570,600 passengers.

That was during the year 1929. That is the total capacity offered by the Claiborne-Annapolis Ferry Company, based on the actual number of trips made by all of the boats in service during the year. The traffic actually carried during 1929 was:

Vehicles	76,352
Passengers	260,950

A comparison of the traffic carried with the facilities offered during the year 1929 indicates that on an average the vessels ran 35.27 per cent loaded as to vehicles and 7.31 per cent loaded as to passengers. Of the facilities for vehicles offered during 1929, not quite 36 per cent were availed of—that is, were actually used, on an average.

[fol. 154] Q. Mr. Dennis, referring to the distances which were given in the application filed by the Chesapeake Beach Railway, they do not, I understand, take into account the new service which your company is arranging to establish?

A. Oh, I think most of the claim is based on the City of Cambridge being a shorter distance by 24 miles; and 24 miles on the Eastern Shore, with the level country and good roads down there, in my humble opinion, is not very essential.

Q. Now, Mr. Dennis, how much time do you calculate will be saved in the Kent Island operation as compared with the waterhaul of the proposed Chesapeake Beach service?

A. Well, it takes about an hour—it takes an hour and thirty-five minutes, which is our schedule, from Annapolis to Claiborne. It won't be more than 35 minutes from Annapolis to the new terminal on Kent Island, which means an hour less on the water.

Q. Now, the water distance of the proposed Chesapeake Beach ferry, as I understand it, is 15.75 land miles. What is your estimate of the time it will take to make that trip?

A. When we built the "Dennis," we asked Fairbanks, Morse & Company to build us engines of the maximum speed capacity; that we wanted to make Claiborne in an hour, and we were willing to pay the price.

As you know, those engines cost about $112,000—of the class that went into the "Dennis"—and our engineers stated to me that it was wholly impracticable to put engines any heavier than what they put in the "Dennis," because forcing a hull with more power would cause bulges and rib troubles and other troubles, and you could not drive a 60-foot bottom boat much faster than about an hour and twenty-five minutes between Annapolis and Claiborne. It has done that, but it had not done any better than that. The distance between Annapolis and Claiborne is about 18 and a fraction miles. It might be 18.7, 19 or somewhere in there. That, of course, sometimes depends on the tide. At low tide, for instance, they have to go down [fol. 155] further at Bloody Point.

A. I think the trip from Chesapeake Beach to Trippe's Bay, if they had the same engines we have and built by the same people, could be made in an hour and a half. But in a ferry service like that, if you break the hour and say "An hour and thirty minutes," you might as well say an hour and forty minutes or an hour and fifty minutes. If you were going to make six trips a day, there would not be any vital advantage in faster time than that.

A. We ought to be able to cross the Bay from Annapolis to Kent Island in 35 minutes with the slowest boat. We ought to be able to go across there in 25 minutes. That would mean that our trip would be approximately one hour less than the water trip of the Chesapeake Beach ferry. Whatever extra distance there might be in a trip for those who live in the lower counties would be more than made up by the shorter distance across the water? It figures this way: All that traffic comes through the hub at Easton, Md. Now, it is about 17 miles from Easton to Claiborne, and about 38 miles from Easton to this new place, where we are fixing the wharf on Kent Island.

Now, you have a distance of 17 miles as against 38 miles, which makes 20 miles. They save an hour on the water and are 20 miles longer on land. They ought to run that 20 land miles in 30 minutes. The proposed service will hamper the efforts of the Clairborne-Annapolis Company to give ade-

quate service. Any depletion is a very serious matter to us. It costs us just as much to run a boat full as it does to run it empty. As a practical matter, if they took away 50 per cent of our traffic, it would cause us either to suspend service or to go broke. We would have to do one or the other.

I do not mean, by suspension of the service, all the service. I mean that we would have to limit our service to very much less service than we are giving now. Our business takes in seven of the nine counties on the Eastern Shore. Of course, the five northern counties are directly and immediately tributary to the Claiborne facilities. As to the [fol. 156] other counties, there is an advantage in there where they propose to put their terminal, but the northern part gives us the advantage in distance, and the southern part gives them a slight advantage in distance. There are some right good sized towns in those upper counties. Caroline County has 18,652 people in it. Talbot County has 18,306 people; Queen Annes County 16,001 people. They are all 1920 census figures. In Caroline County you have Denton. In Dorcester County you have Cambridge. In Queen Annes County you have, I think, Sutlersville; Centerville, in Queen Annes County, which is a good sized town. In Somerset County you have Princess Anne; in Talbot County you have Easton.

Cross-examination:

The nearest points between the Annapolis and Kent Island are 4½ miles. It is 6½ miles the way we are going to run. We can make that in 25 minutes.

Q. Why do you think it will take us an hour and a half to go 15 miles?

A. I think you will find from experience, with the boat you have, that that will be about right. You have open sea down there. You have a different body of water than what we have, even across Kent Island or down around Bloody Point. There are different water conditions. We are going to start the Kent Island Ferry with the "Ritchie"—one boat. We expect to maintain a half-hour schedule next year with three boats. We decided to put this Kent Island operation in because we saw that it was a failure to try to carry passengers in an hour and a half across Chesapeake Bay.

It was too long a time. We thought it was advisable to get a shorter route, and that reduces operating expenses. I felt that the future of this ferry rested on getting a shorter route. Frankly, I cannot see where any more business is to come from. We built a boat because at that time we had not made up our minds that we had to have a shorter route, and we built this boat to take care of the longer route. We want to establish a shorter route to operate it cheaper than the longer route. I am afraid the public will abandon [fol. 157] our longer route. It is 37 miles by road from Kent Island to Claiborne. You know, the road goes around almost a perfect circle that way. You would have to add 17 to 38 miles together. That would be 55 miles.

It may be that we got twenty-three thousand dollars subsidy from the State instead of $21,000. I am not sure. Our total operating revenue was $369,509.18 for 1929. Total operating expenses, $174,518.60. We purchased our new boat, partly out of profits. It is not paid for yet.

Examiner Molster: The annual report for 1928 will be marked Exhibit No. 11, and the annual report for 1929 will be marked Exhibit No. 12.

(The documents referred to were received in evidence, marked, respectively, "Applicant's Exhibit No. 11, Witness Dennis," and "Applicant's Exhibit No. 12, Witness Dennis," and appear here bearing the same numbers.)

So it must have been about two years or a year and half ago that we first contemplated the Kent Island route—something of that kind. The Eastern Shore being a dead-end proposition. An automobile cannot go to Norfolk, because they charge $8.50 ferry charge. I do not know where automobiles go after they leave the ferry. I have no way of knowing—except, of course, by the predominance of Maryland licenses. We connect with the W. B. & A. Railroad at Annapolis. According to the way they place the cars, it is anywhere from 60 feet up to two or three hundred feet from the ferry.

Q. And you handle some business in connection with them?

A. No—except that they deliver us some passengers.

Q. I mean freight.

A. No freight that I know of. You know, there is no freight business on our line, except maybe $10,000 a year.

Q. Have you ever attempted to develop any freight business?

A. Our freight business is developed through the trucks. They put freight in trucks, and we get it that way.

[fol. 158] Q. Now, Mr. Dennis, as I sum up your obections to this plan, they can be divided into sort of two prongs. One is that you are afraid we will go broke, and the other is that you are afraid you will go broke. Now, which is your predominating position?

A. Well, I think the public would be the sufferer, because certainly, if you went broke, it would not help anybody, and, if we went broke, it would hurt everybody who is now traveling between the Eastern Shore and Annapolis.

Q. Are you afraid we will take business away from you?

A. I know you will.

Q. And you are afraid you won't be able to develop any new business to take its place?

A. Yes, sir.

Q. Are you afraid we are in a bad business position for ourselves?

A. Yes, sir. Do you want me to speak honestly?

Q. Certainly.

A. I think it is rotten.

Q. Now, why do you think it is rotten?

A. I think it is like a pie. There is not enough to go around and be divided between more than one.

I have struggled ever since 1922 in the practice of every economy that I can think of, and have been able to pay but one dividend of a total of $15,000.00, and had to plow back all the rest of our earnings to buy equipment to give the public service, because, if you don't give the public service, your business certainly drops off terribly. I would not think that is hot business. It is pretty tough business.

Q. Last year you made $175,000.00; did you not?

A. That is "paper" stuff. You have to pay for repairs, and so on. If you were to get away, on two boats, with an average of $55,000.00 per year for repairs, you would do as well as we are doing. These Government inspectors can see things the matter with boats that nobody else would [fol. 159] dream about! Then you have to put your boats in dry-dock and do what they say to do.

Q. Those things all come under the head of operating expenses; don't they?

A. No, sir. You don't charge, on that statement, repairs to vessels to operating expenses. Of course, they come in the total of operating expenses, but they are segregated.

Q. They are included in the items which you read into the record; aren't they?

A. Yes.

Redirect examination:

The figures for 1928 and 1929 which have been admitted in evidence, are very different than the figures from 1922 up to 1927. We had a very hard time to finance what we were doing. If it had not been that one of our boats burned up, we would have been in a bad way. We got $38,000 insurance to help us out of the hole. Some of our friends got together and helped out. I have many personal friends of my own in this thing—I hope they get out all right—and they helped when we were on the rocks for about six or seven years.

I think there were three years between 1922 and 1927 when our expenses were considerably over our income, and that was without allowing for depreciation and other fixed items which do not appear in an operating statement. 1928 and 1929 were the only two good years we ever had.

Cross-examination:

We bought the "Governor Ritchie" in 1924 or 1925, I think it was. You can tell by the statement of earnings, because, as soon as we got more equipment, people did not have to wait two or three hours for a boat, and our earnings increased.

TESTIMONY IN REBUTTAL

EUGENE FOX was recalled and testified further as follows:

[fol. 160] Direct examination.

By Mr. Ames:

Q. Mr. Fox, the Examiner asked a question which, I am afraid, has left the record somewhat confused as to your

schedule. He indicated that it would possibly be necessary, to haul fruit or produce from the Eastern Shore to Washington, to make the trip across the Bay at night.

Now, will it be your purpose to accommodate your schedule to the business?

A. Yes, sir; and to operate at night, when necessary, for that particular traffic. In making our estimates we took their schedule as a measure or guide to start from. They are now hauling this produce from the Eastern Shore to some extent.

O. K. Elmer B. Collins, for the United States.
O. K.
Jonathan C. Gibson, Atty. for Chesapeake Beach Ry. Co. Nelson Thomas, G., Atty. for Interstate Commerce Comm.

ORDER

Counsel for all parties having agreed thereto, the foregoing narrative of testimony is hereby approved.

Jesse C. Adkins, Justice Supreme Court, D. C.

Dated this 22nd day of September, 1931.

[fol. 161] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, do hereby certify the within and annexed pages No. 1 to 156, both inclusive, to be true and correct copies of exhibits introduced in evidence in cause No. 52,254, in Equity, wherein the Claiborne-Annapolis Ferry Company is plaintiff and the Chesapeake Beach Railway Company, et al., are defendants.

And I do further certify that the within and annexed summary of evidence adduced before the Interstate Commerce Commission in the matter of the Application of the Chesapeake Beach Railway Company, Finance Docket No. 8013, (which evidence was also introduced in said cause), was duly approved by Honorable Jesse C. Adkins, Associate Justice of the Supreme Court of the District of Columbia,

on September 22nd, 1931, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my hand and affix the seal of said Court at the City of Washington in said District, this 12th day of October, 1931.

Frank E. Cunningham, Clerk. (Seal Supreme Court of the District of Columbia.)

[fol. 162] [File endorsement omitted.]

BEFORE INTERSTATE COMMISSION

In the Matter of the Application of the CHESAPEAKE BEACH RAILWAY COMPANY for a Certificate of Public Convenience and Necessity for the Extension of its Line by Establishing and Operating a Ferry for the Transportation of Passengers and Property Between Chesapeake Beach, in Calvert County, Maryland, Across Chesapeake Bay, and a Point on Trippe's Bay, in Dorchester County, Maryland.

APPLICATION—Filed Dec. 26, 1929

[fol. 163] [Title omitted]

To the Interstate Commerce Commission:

The Chesapeake Beach Railway Company, hereinafter called the Applicant, hereby files its application and respectfully shows to the Commission:

I

The exact corporate name of the Applicant is "Chesapeake Beach Railway Company."

II

Applicant is a carrier by railroad subject to the Interstate Commerce Act and is engaged in the transportation [fol. 164] of passengers and property in interstate commerce, operating a line of railroad extending from Chesapeake Junction in the District of Columbia to Chesapeake Beach in Calvert County, Maryland.

III

It is proposed to establish and operate, either directly or through a wholly owned subsidiary, a ferry for the transportation of passengers and property between the terminus of its said line at Chesapeake Beach, across Chesapeake Bay, and a point on Trippe's Bay in Dorchester County, Maryland.

IV

Applicant proposes to finance said extension by an issue of its corporate bonds in the sum of $750,000., secured by a first lien upon all its property.

V

The present and future public convenience and necessity require the establishment of the proposed ferry so as to afford a direct route by rail and water between the City of Washington and surrounding territory and the eastern shore of Maryland and also provide a direct route for the transportation of automobiles and other vehicles between such points.

VI

The name, title and post-office address of the official to whom correspondence in regard to this application is to be addressed is: Eugene Fox, Executive Vice-President, Chesapeake Beach Railway Company, Barr Building, 910 Seventeenth St., N. W., Washington, D. C.

[fol. 165]

VII

Applicant was incorporated under the laws of Maryland on March 7, 1896, and by its certificate of incorporation was authorized to and thereafter did acquire all the property, rights, privileges and franchises of the Washington & Chesapeake Beach Railway Company, a corporation organized under and by virtue of the General Laws of the State of Maryland and Chapter 301 of the Acts of the General Assembly of Maryland, passed at its January Session, 1892, which included the right to operate a continuous line of railway from the District of Columbia to Chesapeake Beach and to own and employ steamboats or other vessels to connect the said railroad with other points by water communication.

VIII

The making and filing of this application was authorized by resolution of the Board of Directors of the Applicant, adopted at a meeting of said Board held in the City of Washington, District of Columbia on October 15, 1929.

IX

The proposed extension of Applicant's line will be situated in Calvert County, Maryland, and Dorchester County, Maryland. The western terminus of the ferry will be in the incorporated town of Chesapeake Beach, Calvert County, and the eastern terminus will be located on what is known as the Thomas J. Seward Farm on Trippe's Bay in Dorchester County, at a point about ten miles west of, and on the State road leading to, the Town of Cambridge in said County. The distance between said termini is sixteen land miles.

[fols. 166-168] X

Applicant files herewith a map showing its present line of railway and the proposed extension thereof, the surrounding territory and all common carrier railroads and ferries therein, which said map is marked Exhibit "A."

Dated Washington, D. C., December 9, 1929.

Chesapeake Beach Railway Co., by Eugene Fox, Executive Vice-President. Geo. E. Holmes, Counsel.

Duly sworn to by Eugene Fox. Jurat omitted in printing.

[fol. 169] Before Interstate Commerce Commission

Finance Docket No. 8013.

In the Matter of the Application of the Chesapeake Beach Railway Company, under Paragraphs (18) to (21), Inclusive, Section 1 of the Interstate Commerce Act, as Amended, for a Certificate That the Present and Future Public Convenience and Necessity Require and Will Require an Extension of its Lines by Establishing and Operating a Ferry for the Transportation of Passengers and Property Between Chesapeake Beach, in Calvert County, Maryland, Across Chesapeake Bay, and a Point on Trippe's Bay in Dorchester County, Maryland

Return to Questionnaire

To the Interstate Commerce Commission:

The Chesapeake Beach Railway Company (hereinafter called "the applicant"), having made application to the Interstate Commerce Commission, under paragraphs (18) to (21), inclusive, of Section 1 of the Interstate Commerce Act, as amended, for a certificate that the present and future public convenience and necessity require and will require an extension of its line by establishing and operat- [fol. 170] ing a ferry for the transportation of passengers and property between Chesapeake Beach in Calvert County, Maryland, across Chesapeake Bay, and a point on Trippe's Bay in Dorchester County, Maryland, a distance of approximately 16 land miles, all in Calvert and Dorchester Counties, Maryland, which application is filed in the office of the Commission in Finance Docket No. 8013, hereby makes return to the form of Questionnaire prescribed by the Commission's order dated December 26, 1929, and hereby affirms that notice of the application has been published in the form prescribed by the Commission at least once during each of three consecutive weeks in the Baltimore Sun and the Cambridge Daily Banner; that said newspapers are of general circulation in the Counties of Calvert and Dorchester, State of Maryland, which are the only counties and the only State in which the proposed extension will be situated; proof of publication marked Exhibit No. 1.

Preliminary Statement

The proposed ferry is intended primarily for the transportation of passengers and motor vehicles. As the questionnaire is not designed to elicit detailed information peculiarly pertinent to the present application, the following preliminary statement of the essential facts relied upon to support the application is submitted.

Under applicant's charter, it may among other things, engage in steamboat operation in connection with its rail lines. After a careful survey of the situation it has been determined that the addition of a ferry service will be a profitable enterprise in which the railway should engage and at the same time provide a service to the public which is a necessity and inconvenience. The supporting data will

appear in its proper place in the return of the questionnaire.

In order to finance this project the Railway Company asks authority to issue its first mortgage bonds in the sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00).

[fol. 171] The Railway derives most of its revenue from passenger traffic. With the advent of the automobile and improved highways, the revenue from this source has for the past five years shown a steady decline, but this has to some extent been equalized by the increase in freight traffic due to the increasing population and business activities of the towns and communities served and applicant believes that the earnings of both freight and passenger traffic can be materially increased by the extension of a ferry service, the estimated net revenues from which will amount to five times the interest on the bond issue.

The service contemplates the purchase or construction of two automobile and passenger ferry boats, of a type designed to carry ninety-five automobiles on the main deck, with a capacity for eighteen hundred passengers on the saloon deck, at an estimated cost of $350,000.00 each.

The distance between ferry terminals is approximately sixteen land miles. It is intended to cover this distance in one hour, thus reducing the present time for vehicular ferry service across Chesapeake Bay, at any point, by at least one-half hour. This service will also evolve a system of transportation for the expeditious handling of passengers and vehicles, both in inter- and intrastate commerce, by rail, water and highway, and by highway and water, and will create a new and shorter route than is now available between the mainland on the western shore of Maryland and the rapidly developing industrial and agricultural territory on the eastern shore, better known as the Del-Mar-Va peninsula. This territory embraces the Maryland Counties of Dorchester, Somerset, Wicomico and Worcester, and the Virginia Counties of Accomac and Northampton. All of this territory is at the present time isolated from direct contact with the mainland of southern Maryland by the waters of Chesapeake Bay, except by markedly circuitous routes. This situation is graphically disclosed by the accompanying Exhibit No. 2 (Bay District Map).

[fol. 172] The proposed ferry service beginning at the present rail head of the Chesapeake Beach Railway, in

Calvert County, will connect at a point on Trippe's Bay in Dorchester County, on the Eastern Shore, with the paved state highway at a point near the Hudson School, approximately ten miles west of Cambridge City, Maryland, from which latter point paved highways radiate in all directions connecting Cambridge with the principal towns on the peninsula, thereby furnishing a shorter and more direct route for traffic by rail, and motor-propelled vehicles between the Del-Mar-Va peninsula, the National Capital at Washington, and the markets at Baltimore, Annapolis, Frederick, Hagerstown, and points west thereof. The highways described are shown on the accompanying official map of the Maryland State Roads Commission, Exhibit No. 3 (State Highway Map).

The proposed service will furnish a wholly new route to and from the territory described. The latest available figures of the United States Census Bureau July 1, 1926, show the population in the six counties enumerated to be 156,697.

In order to graphically illustrate the density of traffic on the principal highways on the eastern and western shores of Maryland shown on the State Highway Map (Exhibit No. 3) applicant submits a traffic map of Maryland prepared by the Engineering Department of the University of Maryland compiled from data based upon 12-hour traffic counts taken on an average of one day per month by the State Roads Commission.

This traffic map (submitted herewith as Exhibit No. 4) shows the principal towns on the eastern and western shores designated by key numbers. The density of traffic is shown on the traffic map by lines of varying width. The towns referred to by key numbers are designated, and the traffic counts upon which the lines illustrating density are based are shown in figures on Exhibit No. 14 submitted herewith, and hereinafter referred to.

[fol. 173] Up to about 1924 the industrial and agricultural development on the Del-Mar-Va peninsula showed very little increase and this condition has been attributed by Mr. William Taylor Medford, Assistant Director of the Traffic and Transportation Bureau of the Baltimore Chamber of Commerce, in the survey made by him May, 1928, to its isolated geographical position.

The nine Maryland counties on the eastern shore embrace 28 per cent of the total population of the State, outside of the metropolitan district of Baltimore.

The two Virginia counties at the apex of the peninisula have a population of approximately 60,000.

These two Virginia counties and the four Maryland counties of Dorchester, Wicomico, Worcester and Somerset constitute the principal territory to and from which the proposed ferry and the railroad will receive support. Included therein are the major shipping and jobbing centers, in the order of their importance, viz.: Salisbury, Cambridge, Princess Anne, Pocomoke, Crisfield, and Accomac. All of these towns are at present at a disadvantage by reason of having no means of transportation, whereby persons and property may be transported by automobile, bus, truck or rail, or by both, to and from their natural market and shopping centers, such as Baltimore, Washington, Frederick, and Hagerstown, and permit of the return of passengers the same day with any degree of convenience, as the present all-rail route and present highway routes are markedly circuitous. This is particularly true of Washington and points west or northwest. This situation is readily disclosed by the mileage table shown in the applicant's Exhibit No. 2.

It is expected that additional earnings will be derived from summer automobile tourist travel. Authoritative figures as to the extent of this particular traffic are not at present available, but it is evident, however, that a valuable source of new business may be created by the opening of this route through the highly historical part of the Old Dominion, which may be used one way as a part of a circle tour.

[fol. 174] The shortening of the water trip by thirty minutes via the proposed ferry, equated to driving miles on the highway at an average speed of 32 miles per hour, is equivalent to 16 miles gained in road distance.

As an illustration of the saving of mileage via the proposed ferry, attention is called to the Mileage Table shown at the lower right-hand corner of Exhibit No. 2, which indicates the following savings:

From	Cambridge	to	Baltimore	18 miles
"	"	"	Washington	36 "
"	"	"	Annapolis	10 "
"	Salisbury	"	Baltimore	6 "
"	"	"	Washington	24 "
"	Ocean City	"	"	24 "

Ocean City is the only city in Maryland on the Atlantic Ocean and the nearest seaside resort available to residents of the City of Washington. The saving of 24 miles each way, or 48 miles for the round trip, would bring Ocean City within 122 miles and thus make it available to motorists from Washington who desire to visit Ocean City, spend a reasonable time there in recreation and return to Washington on the same day.

In arriving at a fair average number of vehicles to be transported per day, applicant has used statistics shown by the traffic chart of the Maryland State Roads Commission (Exhibit No. 4). This survey shows an average daily movement of 780 cars to and from Station T-1. It can reasonably be assumed that all traffic shown at the latter station is destined for ferry service, as said station is but a landing fourteen miles distant from any town of importance. Using the 780 daily average as a basis of possible patronage, your applicant believes that approximately 32% or 250 cars have origin or destination in territory south of the Choptank River and would use the proposed ferry service by reason of the shorter distance (See Mileage Table, Exhibit No. 2).

The estimated revenue to be derived from the handling of automobile traffic is based on an average of $3.00 per vehicle per trip. This estimate is submitted as conservative [fol. 175] in comparison with the scale of tariff charges now on file with the Public Service Commission of Maryland by the Claiborne-Annapolis Ferry Company (Exhibit No. 13), which shows charges ranging from $2.50 for small passenger cars to $12.00 for loaded trucks.

The number of passengers to be handled is based upon the assumption that the cars handled will average two passengers each in addition to the driver. This is supplemented by an estimate of passengers to be handled from motor busses together with residents of the Eastern Shore territory who will be enabled by this new ferry service to visit the Amusement Resort located at Chesapeake Beach.

The estimated revenue to be derived from passenger traffic is based upon a charge of 50¢ per passenger per trip, compared with a minimum fare of $1.00 per round trip now charged by the Claiborne-Annapolis Ferry Company (See Exhibit No. 13).

In connection with the estimated revenues from passenger and vehicular traffic, attention is invited to applicant's Exhibit No. 7 submitted in connection with its answer to question No. 30. In this exhibit applicant has, as above stated, estimated that the average daily number of vehicles for the first year would be 250 and the average daily number of passengers would be 500, and has estimated an annual increase of 10% for the succeeding four years.

Applicant submits that this estimated increase of 10% per annum is exceedingly conservative compared with the steady increase of motor vehicular traffic on that part of the Eastern Shore which the ferry will serve, and particularly with the increase in traffic to and from Station T-1, as shown on applicant's Exhibit No. 14.

As pointed out above, the traffic to and from Station T-1 is solely in connection with the ferry service. Exhibit No. 14 shows an increase of 57% in the period 1926 to 1929 inclusive.

The foregoing estimate of revenue does not take into account any subsidy from the State of Maryland for the operation of a ferry. That State grants to the Claiborne-[fol. 176] Annapolis Ferry and the Tolchester Ferry annual subsidies of $23,000 and $21,000 respectively. These subsidies are at the rate of $1,000 per mile traversed by each ferry and represent the estimated annual maintenance cost of an equivalent number of miles of highway saved to the State by such ferry operations. Applicant intends to apply to the State of Maryland for an annual subsidy of $16,000 based upon the rate of $1,000 for each land mile of the proposed ferry route.

As further evidence of the public convenience and necessity which the proposed extension will serve applicant calls attention to the fact that there has for some time been an insistent demand among the residents of the Eastern Shore for the establishment of a ferry service of the character proposed. This demand was crystallized in a circular letter issued by Frank Robbins of Cambridge, Mary-

land, addressed to the business interests of that city and vicinity, calling a public meeting to be held on September 4, 1928, a photostatic copy of which circular letter, dated September 1, 1928, is submitted herewith as Exhibit No. 5. In pursuance of such call, a meeting was held at Cambridge on September 4, 1928, as a result of which there was organized, under the laws of Maryland, a corporation known as The Cambridge Ferry Company for the purpose of establishing a ferry between the Eastern Shore and a point a few miles north of the eastern terminus of the applicant's railway line.

After a thorough survey of all the available points for a landing place on the Eastern Shore, the Ferry Company acquired an option on what is known as the Seward Farm located on Trippe's Bay which is ideally situated with respect to the County highways and is shown on Exhibit No. 15.

The Cambridge Ferry Company applied to the Public Service Commission of Maryland for a certificate of public convenience and necessity, which application was duly advertised and set down for a hearing, but consideration thereof was indefinitely postponed owing to the fact that [fol. 177] the Company had not established a suitable financial plan. Thereafter the Cambridge Ferry Company requested applicant to interest itself in the ferry proposition, which it did, and upon being convinced of the desirability of a ferry service determined upon a plan for the extension of its service from its railhead at Chesapeake Beach to the said Seward Farm at Trippe's Bay. Accordingly the option which the Cambridge Ferry Company had on said farm was acquired for the applicant's benefit and thereupon the original plans of The Cambridge Ferry Company were abandoned. Applicant's plan has met with general approval of the business interests and property owners on the Eastern Shore. Evidence of this approval is shown in various letters received by Mr. Robbins and his associates, typical photostatic copies of a number of letters are submitted herewith and marked collectively, Exhibit No. 5.

Having discussed the plan generally applicant now submits answers to the questions set forth in the questionnaire, as follows:

1 Q. The essential facts relied upon to support the statement that the applicant is a carrier by railroad engaged in

the transportation of passengers or property, subject to the interstate commerce act, or is a corporation organized to construct and operate a railroad.

1 A. For more than ten years past applicant has been actually engaged in interstate commerce in the operation of a line of railroad between Chesapeake Junction within the District of Columbia and Chesapeake Beach in Calvert County, Maryland.

2 Q. Whether the proposed new line of railroad will be both constructed and operated by the applicant.

2 A. Yes, the applicant desires to reserve the right to apply to the Interstate Commerce Commission to transfer the operation of the proposed extension to a wholly owned subsidiary.

3 Q. Whether or not any corporation, individual, or trustee, holds control over the applicant at the date of filing this return. If control is so held:

[fol. 178] (a) The form of control, whether sole or joint, and whether in trust.

(b) The name and business address of the controlling corporation, individual, or trustee.

(c) The manner in which control was established.

(d) The extent of control.

(e) Whether control is direct or indirect.

(f) The name and business address of the intermediary through which control, if indirect was established and is exercised.

(g) The name and business address of the beneficiaries, for whom the trust, if any, is maintained.

(h) The purpose of the trust.

3 A. Yes.

(a) In trust.

(b) William V. Hodges, Colorado National Bank Building, Denver, Colorado.

(c) Substantially all of the stock and bonds of applicant were owned by the late D. H. Moffatt, of Denver. Upon his death certain creditors of the estate agreed to accept from the estate stock and bonds of the Railway Company in satisfaction of their claims. Thereupon the estate turned said securities over to William V. Hodges, as trustee, and the other owners of stocks and bonds of the Railway Company did likewise, to enable Wm. V. Hodges, as trustee to operate the road for the benefit of all parties in interest.

(d) William V. Hodges as such trustee has complete control.

(e) The control is direct.

(f) No intermediary.

(g) The names and business addresses of the beneficiaries are as follows:

[fol. 179] Estate Thomas F. Walsh, Care American Security & Trust Co., 15th & Pennsylvania Ave., Washington, D. C.

Estate Joseph Jacobson, Care Mr. F. J. Claussen, Trustee, 32 Liberty St., New York City.

Estate W. S. Stratton, Care Dines, Dines & Hulm, First National Bank Building, Denver, Colorado.

Estate Walter S. Cheesman, Care Mr. John Evans, First National Bank Building, Denver, Colorado.

Mr. J. W. Graham, 822 E. & C. Building, Denver, Colorado.

Estate Owen E. LeFevre, Care Harry E. Bellamy, 801 16th Street, Denver, Colorado.

Estate John F. Campion, Denver National Bank, Denver, Colorado.

Estate D. Herbert Dunn, Care Ezra Elliott, Del Norte, Colorado.

Estate Nathaniel P. Hill, Care Smith & Brock, Telephone Building, Denver, Colorado.

Spencer Penrose, Colorado Springs, Colorado.

Thomas Keely, Colorado National Bank Building, Denver, Colorado.

Kendall Keely, Colorado National Bank Building, Denver, Colorado.

First National Bank New York City.

Estate of Charles McNeill, Care Mrs. Willing Spencer, 940 Park Ave., New York City.

[fol. 180] (h) The purpose of the trust—see answer to 3. A (c) above.

4 Q. Whether the applicant is connected by common stock ownership, or otherwise, with any industry to be served by the proposed line. If so, state the facts.

4 A. No connection.

5 Q. Amount and kind of capital stock (a) authorized, and (b) issued, for construction of the proposed line.

5 A. It is not proposed to issue any stock for the construction of the proposed extension.

6 Q. The chief purposes and functions of the proposed line.

6 A. To furnish a shorter, more direct and more convenient route to and from the eastern shore of Maryland.

7 Q. The classes of service to be performed, as passenger, freight, express, and switching.

7 A. The transportation of passengers and motor vehicles.

8 Q. The kind of motive power to be used. If electric power, state source and estimated cost.

8 A. Motor propelled ferry boats.

9 Q. Whether the proposed line will receive material revenue from the territory traversed, or serve any material public convenience and necessity of the local territory. If the answer is "no" the applicant may elect to omit answers to questions 10 to 21, inclusive.

9 A. The proposed extension will receive material revenue from the territory served.

10 Q. The name and population of each county in which the proposed new line of railroad will be situated and the name and population of each city, town and village at which a station will be established, together with its distance from a designated initial point, with the source of information as to population.

[fol. 181] 10 A. The proposed ferry will be operated from Chesapeake Beach, Calvert County, Maryland, to Trippe's Bay, Dorchester County, Maryland. The population of Calvert County is 9,744 and the population of Dorchester County is 27,895. The population of the above counties is that shown by the estimates July 1, 1926, of the United States Census Bureau.

11 Q. The names of places mentioned in paragraph 10 that are now served by common carriers (excluding street railways), and the name of each common carrier serving the several places.

11 A. The landing point on Trippe's Bay is on an improved highway but no town exists there at the present time.

12 Q. The names of the places mentioned in paragraph 10 that have no common carrier service, giving the distance in miles of each such place from the nearest station on a common carrier, together with the name of each such carrier and the character of the connecting highway.

12 A. See answers to Q. 13 and Q. 14.

13 Q. The name and population of each city, town and village (together with state and county in which located), having a population of 200 or more and lying within 10 miles of the proposed new line of railroad, but not entered thereby.

13 A. The nearest town is Cambridge which has a population of about 10,000.

14 Q. The approximate distance in miles by highway from the nearest station on the proposed new line of railroad to each of the places enumerated in paragraph 13, and the names of all common carriers, if any, now serving each.

14 A. Cambridge, 10.8 miles from the ferry landing which city is now served by the Pennsylvania Railroad.

15 Q. The names of other common carriers with which the proposed new line of railroad will connect, and the proposed points of track connection.

15 A. None.

[fol. 182] 16 Q. The general topography of the country through which the proposed new line of railroad will extend, indicating whether level, rolling, mountainous, cultivated, pasture, prairie, desert, rock, timbered, or underlaid with minerals.

16 A. Not applicable.

17 Q. The approximate area of the territory to be served, an estimate of the population therein, and of the area,

(1) timber

(2) in pasture, and

(3) under cultivation.

17 A. The approximate area of the territory to be served is 4,135 square miles and the estimated population is 248,294. The remaining part of question No. 17 is not regarded as applicable inasmuch as the facilities to be afforded by the proposed ferry will be limited to transportation of passenger and motor vehicle traffic.

18 Q. The kinds of industry carried on in the area to be served, such, for example, as farming, dairying, grazing, coal mining, manufacturing, lumbering, etc., and the relative importance of each.

18 A. Not applicable, for reasons stated in 17 A. above.

19 Q. The main facts as to the age, growth and extent

of such industries, their probable future growth and permanence and the reasons therefor.

19 A. Not applicable, for reasons stated in 17 A. above.

20 Q. What carriers now serve these industries, and to what extent?

20 A. The carriers now serving these industries are the Pennsylvania Railroad Company and its subsidiaries north and south.

21 Q. Whether the chief support of the proposed new line of railroad will come from the general community or from some particular industry, or industries, located or to be located. In the latter case give facts concerning [fol. 183] such particular industry or industries and applicant's contractual or financial relation thereto.

21 A. The chief support of the proposed ferry will come from the transportation of passenger and motor vehicles.

22 Q. Whether the proposed new line of railroad will be built primarily for a direct profit from railway operation, or for the advantage of any other industry or business. If for the latter, state what industry or business will be benefited, what such advantages will be, and the applicant's contractual or financial relation to such industry or business.

22 A. The proposed ferry extension will be built primarily for a direct profit from ferry operation.

23 Q. If the proposed new line of railroad is an extension of an existing railroad, branch, connecting track or cut off, in so far as not fully set forth under paragraphs 21 and 22, the extent to which it is expected to be directly profitable in itself, and the extent to which it is expected to be justified by its effect on the business of the existing line.

23 A. See 21 A. and 22 A. above.

24 Q. If the proposed new line of railroad is to be a connecting link between existing railroads, the kind and volume of traffic, expressed in tons or carloads, that probably will be interchanged.

24 A. Not applicable.

25 Q. What economies will be effected by such interchange of traffic?

25 A. Not applicable.

26 Q. Of the interchange traffic mentioned in answer to paragraph 24, what part, expressed in tons and carloads,

cannot be hauled or moved between common points by existing railroads?

26 A. Not applicable.

27 Q. The facts as to any agreement, tentative or otherwise, with existing carriers, covering operation of the proposed line, interchange of traffic, division of rates, or trackage rights.

[fol. 184] 27 A. The applicant has no agreement with existing carriers.

28 Q. Whether any aid, gift, grant of right of way, or other donation has been promised in connection with the proposed new line of railroad, and, if so, the names of all persons, natural or artificial, giving such aid, gift, grant of right of way, or other donations, with a statement of the nature and value thereof.

28 A. No aid, gift, grant of right of way, or other donation in connection with the proposed new ferry line has been promised.

29 Q. The manner in which it is proposed to finance construction and equipment, the kind and amount of securities to be issued, and the approximate terms of their sale; to what extent funds for financing are now available, and which, if any, of such securities will be underwritten by industries to be served by the proposed line.

29 A. It is proposed to finance the construction of the ferry and provide it with working capital by the proceeds of an issue of applicant's Twenty Year 6% Bonds in the aggregate principal sum of $750,000. to be secured by a first mortgage on all of the physical assets of the company now owned and to be acquired, including the ferry properties, subject only to Equipment Trust Certificates in respect of the cost of the ferry boats to the extent of not more than 75% of such cost. The company has outstanding at present first mortgage bonds in the aggregate principal sum of $1,000,000. The company is in default for the payment of principal and interest on said issue of bonds, all of which bonds outstanding are owned by William V. Hodges as Trustee, who also, as hereinbefore set forth, owns all of the stock of the company and in addition thereto is the owner of certain other liens and claims against it. The said William V. Hodges has agreed to satisfy and discharge of record the present first mortgage and all other liens and claims held by him, so that the mortgage to secure the proposed new issue of $750,000. of bonds

may be a first lien upon all of the physical assets of the company, said Hodges agreeing to accept a second mortgage of $600,000. The aggregate principal sum of the proposed new first and second mortgages is considerably less than the amount now due on account of principal and in- [fol. 185] terest on the present outstanding mortgage. Applicant has not yet completed plans for the sale of the new bonds.

With reference to applicant's ability to pay the interest on and retire said bonds, attention is invited to the estimate of earnings set forth in the answer to Question No. 30.

Applicant also submits herewith a statement of Operating Revenue, Expenses and Income exclusive of interest on funded and unfunded debt of The Chesapeake Beach Railway Company, for the years 1924 to 1929, inclusive, marked Exhibit No. 6. In this connection applicant calls attention to the fact that while the earnings for the five-year period ended December 31, 1928, were not sufficient to pay the operating expenses, the statement shows a net operating income for the year 1929, due to economies effected by the present management, which took charge of the Railroad in June of that year. It is reasonably expected that with the continuation of these economies and the development of increased traffic there will be a still further increase in net railway operating income exclusive of the income from ferry operations as shown in the estimate set forth in answer to Question No. 30.

30 Q. An estimate, in detail, of the character and volume of traffic expected and the gross revenue to be derived therefrom, covering each of the first five years following the completion of the proposed new line of railroad, together with an estimate of the annual revenues expected after the first five years. The detailed estimate required for the first five years should show the amount of each class of traffic, the mean length of haul, the rate per unit, and the revenue to be derived. Chief points or territories of origin and chief points or territories of destination of traffic.

30 A. Exhibit No. 7 is an estimate, in detail, of the character and volume of traffic expected and the gross revenue to be derived therefrom covering each of the first five years following the completion of the proposed ferry, the rate per unit and the revenue to be derived therefrom. This

estimate has been discussed in detail in the Preliminary Statement (See ante, pp. 6-7).

31 Q. The estimated total gross revenue, operating expenses, net revenue and net railway operating income, cor- [fol. 186] responding with the estimates of traffiic under paragraph 30. By "net railway operating income" is meant the excess of the credits over the debits to income, as reflected by the operating revenue, operating expense, railway tax accrual, uncollectible railway revenue, equipment rent, and joint facilities rent accounts.

31 A. Exhibit No. 7 referred to in 30 A. is designed to show the estimated gross income for the first five years.

Exhibit No. 8 again sets forth the estimated gross operating revenue with deductions for estimated operating expenses and estimated taxes and insurance for the first five-year period.

The operating expenses for the first five years are shown at the constant figure of $103,567. The details of this latter item are shown in Exhibit No. 9.

Exhibit No. 10 is designed to show the net operating income reflected by Exhibit No. 8, after deduction of fixed charges. These fixed charges consist of interest on Equipment Trust Certificates, amortization thereof and interest on $750,000. bond issue covering the railway and the ferry. The estimated net income for the first year as thus shown by Exhibit No. 10 is $117,443, with an estimated annual increase of 10% for the succeeding four years, bringing the net income for the fifth year up to $298,115, after which time it is expected that the net income will be constant.

Exhibit No. 11 is designed to show, for the five years beginning with 1931 when the ferry will be put in operation, the operating revenues expected to be derived from freight, passenger and other sources; operating expenses; net revenue from railway operations, and after deducting therefrom tax accruals and equipment maintenance, a net railway operating income of $31,200. for 1931, increasing to $57,200. for 1935.

Inasmuch as the net operating income from the ferry will accrue to the railway company as sole owner of the ferry (or sole owner of any subsidiary corporation which may operate the ferry), applicant submits for the information of the Commission an estimate of operating income of the railway proper and an estimate of the combined income from railway and ferry service.

Exhibit No. 12 is designed to show the estimated net income from combined railway and ferry service for the [fol. 187] five years beginning January 1, 1931, indicating a total net income of $143,633. for the year 1931, increasing to $355,315. for the year 1935.

32 Q. The part of the estimated traffic which will constitute net additional business developed or created by the construction of the proposed new line of railroad, and the part that will be diverted from existing railroads.

32 A. All of the estimated traffic will constitute net additional business developed or created by the operation of the proposed ferry.

33 Q. The particular mining, timbering, manufacturing or other enterprises to be established contingent on the construction of the proposed new line of railroad and the applicant's contractual or financial relation thereto. The tonnage or number of cars of freight expected from such enterprise.

33 A. None.

34 Q. The dates on which it is expected to begin and to complete the construction of the proposed new line of railroad.

34 A. It is expected to begin construction of the proposed ferry immediately upon authorization by the Commission and to complete it by May 1, 1931.

35 Q. The engineering work in full detail which has been done with respect to the proposed line at the time of filing the return.

35 A. All preliminary soundings, surveys for piers, docks and dredging have been made, and necessary applications based thereon have been submitted to and permits granted by the War Department. Copies of the Engineer's specifications and estimates of cost of dredging and cost of construction and materials for docks and piers; application to and permits granted by War Department are submitted herewith and marked respectively Exhibits Nos. 15, 16, 17 and 18.

36 Q. The following particulars as to the physical characteristics of the proposed new line of railroad.

[fol. 188] 36 A. Not applicable.

37 Q. An estimate of total increase in charges to road and equipment account during the first five (5) years after completion of the line. If this displaces rental charges on equipment, so show.

37 A. Not applicable.

Respectfully submitted.

The Chesapeake Beach Railway Company, by Eugene Fox, Executive Vice-President. George E. Holmes, Counsel.

[fols. 189-191] *Duly sworn to by Eugene Fox. Jurat omitted in printing.*

[fol. 192] EXHIBIT No. 1

Morning Evening Sunday

The Sun

The A. S. Abell Company, Publishers, Baltimore, Md.

STATE OF MARYLAND,

City of Baltimore, ss:

Before me, a Notary Public, in and for said city and state, this twentieth day of January, 1930, came C. S. Funkhousen, personally known to me, who, being duly sworn, states as follows: That he is an employee of "The Sun" and that said publication in the issues of January 6-13-20—1930 once a week for three weeks carried the attached advertisement of Legal Notice Chesapeake Beach Railway Company—Application to Interstate Commerce Comm. Also that the Sun is in general circulation in all counties of Maryland.

Signature: C. S. Funkhousen. Edw. H. Frey, Notary Public. (Seal.)

Notice

Chesapeake Beach Railway Company hereby gives notice that on the 26th day of December, 1929, it filed with the Interstate Commerce Commission at Washington, D. C., its application for a certificate that the present and future public convenience and necessity require the extension of its line by establishing and operating a ferry between the present terminus of its line at Chesapeake Beach across Chesapeake Bay to a point on what is known as the Thomas J. Seward Farm on Trippe's Bay, which point is about 10 miles west of and on the State road leading to the town of Cambridge, a distance of 16 miles, all in Calvert and Dorchester counties, Maryland.

Chesapeake Beach Railway Company, by Eugene Fox, Executive Vice-President.

[fol. 193] Cambridge, Md., Jan. 18, 1930.

I hereby certify, that the annexed Notice Chesapeake Beach Railway Co. was published in The Daily Banner, a newspaper published in Cambridge, Dorchester County, Md., once in each of 3 successive weeks, prior to —-- —, 19—, commencing with the issue of January 3, 1930.

P. Watson Webb, Editor, per M. W.

Notice

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Chesapeake Beach Railway Company, by Eugene Fox, Executive Vice-President.

[fol. 194] Exhibit 2

Map of Bay District

(Here follows map, side folio 195)

[fol. 196] Exhibit 3

Maryland State Highway Map

(Here follows map, side folio 197)

[fol. 198] Exhibit 4

Traffic Map of Maryland Showing Distribution of Traffic Over State Highways

(Here follows map, side folio 199)

MAPS ARE TOO LARGE TO BE FILMED

[fols. 200-218] EXHIBIT 5

Circular Letter of Frank Robbins of Cambridge, Maryland, Calling Public Meeting for Consideration of Proposed Ferry, and Letters to Frank Robbins and Associates From Various Organizations and Individuals on the Eastern Shore of Maryland, Approving Plans for Proposed Ferry.

[Omitted in printing.]

[fol. 219]

Exhibit 6

Operating Revenues of Chesapeake Beach Railway Company for the Years 1924 to 1929, Inclusive

[fol. 220]

Note.—$1,606.00 Demurrage Uncollected. #Deficit or Debit Items.

Chesapeake Beach Railway Company

Operating Revenues, Expenses, and Income, Exclusive of Interest on Funded and Unfunded Debt

	1924	1925	1926	1927	1928	1929
Operating revenues:						
Freight	$34,409.43	$37,578.39	$40,334.76	$37,020.75	$49,171.04	$57,467.20
Passenger	103,982.13	97,118.17	80,258.93	73,655.45	68,451.32	60,679.67
Mail	2,003.76	2,032.79	1,994.44	1,994.41	3,548.54	3,550.95
Express	1,246.04	1,409.97	1,126.10	1,076.56	852.79	1,014.63
All other Transportation	2,981.13	2,546.15	1,807.15	1,452.61	1,242.59	511.40
Incidental	7,914.41	8,353.33	8,706.79	7,854.39	7,634.21	#9,300.87
Total railway operating revenues	$152,536.90	$149,038.80	$134,228.17	$123,054.17	$130,900.49	$132,524.72
Operating expenses:						
Maintenance of Way & Structures	$48,150.44	$45,736.06	$39,708.35	$39,865.41	$38,024.11	$25,555.72
Maintenance of Equipment	26,680.65	26,264.96	22,568.16	24,652.59	27,035.71	19,183.64
Traffic	8,762.65	8,232.73	7,595.95	7,476.63	6,417.09	8,345.37
Transportation	58,949.47	58,562.74	53,983.79	53,965.32	50,394.75	51,471.90
General	12,085.45	14,316.15	8,073.97	8,382.79	8,737.24	9,444.30
Total railway operating expenses	$154,628.66	$153,112.64	$131,930.22	$133,742.74	$130,608.90	$114,000.93
Income items:						
Net Revenue from Ry. Operations	#$2,091.76	#$4,073.84	$2,297.95	#$10,688.57	$291.59	$18,523.79
Railway Tax Accruals	5,698.44	5,709.89	5,612.50	5,770.30	5,225.42	5,754.31
Uncollectible Railway Revenue	9.25	.....	.31	.40	.87	.50
Railway operating income	#$7,799.45	#$9,783.73	#$3,314.86	#$16,459.27	#$4,934.70	$12,768.98
Equipments	234.54	# 95.13	# 762.23	# 1,793.85	# 3,873.45	# 5,329.39
Net railway operating income	#$7,564.91	#$9,878.86	#$4,077.09	#$18,253.12	#$8,808.15	$7,439.59

[fol. 221]

Exhibit 7

Statement of Estimated Gross Operating Revenue of Ferry for First Five Years

[fol. 222]

Chesapeake Beach Railway Company

Proposed Ferry System

Statement of Estimated Operating Revenue for Five Years

	First year	Second year	Third year	Fourth year	Fifth year
Estimated number of cars Handled per day @ $3.00 per car	250	275	302	332	365
Cars Handled Per Year	91,250	100,375	110,230	121,180	133,225
Est. Yearly Vehicle Rev	$273,750	$301,125	$330,690	$363,540	$399,675
Estimated Passgrs. Hnd'd per day @50c	500	550	605	665	731
Passgrs. Hnd'd Per Year	182,500	200,750	220,825	242,725	266,815
Est. Yearly Passgr. Rev	91,250	100,375	110,412	121,362	133,407
Estimated gross operating revenue	$365,000	$401,500	$441,102	$484,902	$533,082

[fol. 223]

EXHIBIT 8

Statement of Estimated Net Operating Revenue of Ferry for First Five Years

[fol. 224]

Chesapeake Beach Railway Company

Proposed Ferry System

Statement of Net Operating Revenue for Five Years

	1st year	2nd year	3rd year	4th year	5th year
Gross Operating Revenue..... (See Exhibit 7.)	$365,000	$401,500	$441,102	$484,902	$533,082
Operating Expenses*..... (See Exhibit 9.)	103,567	103,567	103,567	103,567	103,567
Taxes, Insurance.....	15,000	15,000	15,000	15,000	15,000
	$118,567	$118,567	$118,567	$118,567	$118,567
Net operating revenue..	$246,433	$282,933	$322,535	$366,335	$414,515

*Excludes depreciation.

[fol. 225] EXHIBIT 9

Statement of Estimated Detailed Cost of Operation of Ferry per Annum

[fol. 226] Chesapeake Beach Railway Company

Proposed Ferry System

Statement of Estimated Cost of Operation per Annum

Equipment

Two (2) steel, double-end, screw Diesel engine propelled passenger and automobile ferry boats, designed to meet the requirements of the American Bureau of Shipping and the United States Steamboat Inspectors and having capacity of 95 automobiles and 1500 passengers, for service between Chesapeake Beach, Calvert County, Maryland and Covey Creek, Dorchester County, Maryland, a distance between landings of approximately 14½ knots.

Approximate Dimensions

Displacement loaded	1,800 tons
Length (over all)	256 feet
Width of beam, molded	46 feet
Width over guards	66 feet
Draft (light)	11 ft. 6 in.

Power

Two (2) units, each 1200 H. P. reversible marine type Diesel engines, each unit direct connected to one propeller, one propeller on each end of boat, together with the necessary auxiliaries for the proper operation of the boats' speed of approximately 14½ knots.

Cost of Operation

1 Captain,	91¢ per hour	$7.28 per day
1 Mate and Pilot,	91¢ " "	7.28 " "
1 Chief Engineer,	91¢ " "	7.28 " "
1 Ass't Engineer,	83¢ " "	6.64 " "
1 Quartermaster,	64¢ " "	5.12 " "
3 Deck Hands,	64¢ " "	15.36 " "
1 Watchman,	64¢ " "	5.12 " "
1 Purser,	83¢ " "	6.64 " "

Fuel, 1100# @ Single Trip @ 1¢ per #—$11.00.

[fol. 227] Service

May 1st to October 15th—12 Single or 6 Round Trips per Day

Fuel	$132.00	
Crew	121.44	
Total Per Day	$253.44	
Total for 168 Days		$42,527.52

October 15th to May 1st—197 Days, 8 Single or 4 Round Trips per Day

Fuel	$88.00	
Crew	121.44	
Total Per Day	$209.44	
Total for 197 Days		41,259.68

Terminal Expense

2 Agents, Per Month	125.00	
2 Assistants, " "	100.00	
4 Bridgetenders " "	100.00	
Total Monthly	$850.00	
Total Per Annum		10,200.00

Maintenance

Repairs to Equipment (Estimated)	5,000.00

Recapitulation

Service	Total for 168 Days	42,527.52
	Total for 197 Days	41,259.68
	Terminal Expense	10,200.00
	Maintenance	5,000.00
	Incidentals 5%	4,579.36
	Total	$103,566.56

[fol. 228]

EXHIBIT 10

Statement of Estimated Net Ferry Income After Fixed Charges

[fol. 229]

Chesapeake Beach Railway Company

Proposed Ferry System

Statement of Estimated Net Income After Deduction of Fixed Charges

	1st year	2nd year	3rd year	4th year	5th year
Net Operating Revenue (See Exhibit 9.)	$246,433	$282,933	$322,535	$366,335	$414,515
Fixed Charges:					
Int. on Equipment Trust	31,500	28,350	25,200	22,050	18,900
Amortization	52,500	52,500	52,500	52,500	52,500
Int. on $750,000 Bond Issue	45,000	45,000	45,000	45,000	45,000
Total Fixed Charges	$129,000	$125,850	$122,700	$119,550	$116,400
Estimated net income	$117,433	$157,083	$199,835	$246,785	$298,115

[fol. 230] EXHIBIT 11

Statement of Estimated Railway Operating Income for the Five Year Period Beginning January 1, 1931

[fol. 231] Chesapeake Beach Railway Company

Statement of Estimated Railway Operating Income for Five-year Period Beginning January 1, 1931

Operating revenues:	1931	1932	1933	1934	1935
Freight	$70,000	$77,000	$80,000	$83,000	$85,000
Passenger	75,000	80,000	82,000	85,000	88,000
Other	15,000	15,000	15,000	15,000	15,000
	$160,000	$172,000	$177,000	$183,000	$188,000
Operation expenses	$119,000	$119,000	$119,000	$119,000	$119,000
Income items:					
Net Rev. from Ry. Operations	$41,000	$53,000	$58,000	$64,000	$69,000
Railway Tax Accruals	5,800	5,800	5,800	5,800	5,800
Equipments	4,000*	5,000*	5,000*	5,000*	6,000*
Net railway operating income	$31,200	$42,200	$47,200	$53,200	$57,200

*Adjusted Per Diem Basis.

[fol. 232]

EXHIBIT 12

Statement of Estimated Combined Net Income of Railway and Ferry

[fol. 233]

Chesapeake Beach Railway Company

Statement of Estimated Net Income from Combined Railway and Ferry Service for Five-year Period Beginning January 1, 1931

	1931	1932	1933	1934	1935
Railway (See Exhibit 11.)	$31,200	$42,200	$47,200	$53,200	$57,200
Ferry (See Exhibit 10.)	117,433	157,083	199,835	246,785	298,115
Total net income	$148,633	$199,283	$247,035	$299,985	$355,315

[fol. 234] EXHIBIT 13

Published Tariff of Claiborne-Annapolis Ferry Co.

[fol. 235] Tarriff No. 2

Public Service Commission of Maryland

Claiborne-Annapolis Ferry Company

For automobiles, each way, including for driver or chauffeur, according to the length of wheel base, viz:

(a) From 90 to and including 110 inches	$2.50
(b) From 110 to and including 130 inches	3.00
(c) From 130 inches up	3.50

For automobile trucks each way, including the chauffeur or driver, a gradusted scale from $3.00 to $12.00 according to capacity and load of truck, viz:

	Light	Loaded
½ ton truck	$3.00	$4.00
¾ ton and 1-ton trucks	4.00	5.00
1½ ton truck	5.00	6.00
2 ton truck	6.00	7.00
2½ ton truck	7.00	8.00
3 and 4 ton truck	10.00	12.00

For motorcycles, each way, including driver, single $1.00; with side-car attachment $1.50.

For passengers, single fare $0.65; round trip $1.00; children under six years, free: six to twelve years $0.35 single fare and $0.55 round trip.

B. F. Sherman, General Manager.

[fol. 236] EXHIBIT 14

Statistics Compiled by the State Roads Commission Showing Increase of Motor Vehicle Traffic in Territory to be Served by Proposed Ferry

[fol. 237]

Station number	Vacinity of	Total all vehicles			
		1926	Oct. to Oct., 1928, 1929	Increase vehicles	Per cent
W-1-3	Salisbury	565	881	316	55.9
" " 4	"	830	1704	874	105.3
" " 6	"	747	1871	1124	150.6
" " 7	"	415	976	561	135
Average	"	639	1358	719	112.5
S-4	Crisfield	415	742	327	78.7
" 5	"	664	1111	447	68.5
Average	"	539	927	388	71.9
W-0-9	Pocomoke	456	848	392	85.9
" " 10	"	605	998	393	64.9
Average		530	923	393	74
W-0-3	Ocean City	398	1194	796	200
D-5	Cambridge	747	1496	749	100.2
" 6	"	581	1272	591	118.9
Average		664	1384	720	108.4
T-1	Claibourn	498	780	286	57

[fol. 238] EXHIBIT 15

Map Showing Location of Sollard Farm on Trippe's Bay and Preliminary Survey of Road Location, Docks, Piers, and Dredging for Eastern Terminal Site

(Here follows exhibit, side folio 239)

[fol. 240] EXHIBIT 16

Preliminary Survey of Road Location and Docks, Piers, and Dredging for Western Terminal Site at Chesapeake Beach

(Here follows exhibit, side folio 241)

[fols. 242-263] EXHIBIT 17

Engineer's Specifications and Estimate of Cost of Dredging and Construction of and Materials for Docks and Piers at Ferry Terminals

[Omitted in printing.]

[fol. 264] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 8013

[Title omitted]

PETITION OF INTERVENTION

Comes now your petitioner, The Claiborne-Annapolis Ferry Company, a Maryland corporation, and respectfully represents that it has an interest in the matters involved in the application made by the Chesapeake Beach Railway Company for a certificate of public convenience and necessity for the extension of its line by establishing and operating a ferry across the Chesapeake Bay between the points designated in the said application, and desires to intervene in and become a party to said proceeding, and for grounds of the proposed intervention says:

I. That the petitioner is a corporation of the State of Maryland, and is engaged in the business of operating a ferry service for the transportation of passengers and property across the Chesapeake Bay from Claiborne, Tal-
[fol. 265] bot County, Maryland, to Annapolis, Anne Arundel County, Maryland.

II. Your petitioner has expended large sums of money for the acquisition of ferry boats of sufficient size and capacity to maintain an adequate service across the Chesapeake Bay.

III. Your petitioner is opposed to the granting of the application of the Chesapeake Beach Railway Company for the reason that the ferry service proposed to be operated by the applicant from Chesapeake Beach, Calvert County, Maryland, to a point on Trippe's Bay in Dorchester County, Maryland, will interfere with and hamper the efforts of

your petitioner to give adequate service on its present route.

IV. Your petitioner denies that the present and future public convenience and necessity requires the establishment of the proposed ferry.

V. Your petitioner denies the correctness of the information as to distances contained on the map filed by the applicant with its application, and marked "Exhibit A."

VI. The name, title and post-office address of the official to whom correspondence in regard to this petition is to be addressed is: John M. Dennis, Vice-President, The Claiborne-Annapolis Ferry Company, Union Trust Building, Baltimore, Maryland.

Wherefore the said The Claiborne-Annapolis Ferry Company prays leave to intervene and be treated as a party hereto with the right to have notice of and appear at the [fol. 265½] taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Dated at Baltimore, Maryland, March 31, 1930.

The Claiborne-Annapolis Ferry Co., by John M. Dennis, Vice-President. Philip B. Perlman, Counsel, 1023 Munsey Building, Baltimore, Maryland.

[fol. 266] *Duly sworn to by John M. Dennis. Jurat omitted in printing.*

[fol. 267] INTERSTATE COMMERCE COMMISSION

Docket No. 8013

Date: 4/7/30.

APP. EX. No. 1

Witness: Rector

Chaney

Charter of the Washington and Chesapeake Beach Railway Company

Chapter 301 of the Acts of the General Assembly of Maryland, Passed at its January Session, 1892

Section 1. Be it enacted by the General Assembly of Maryland, That the charter heretofore granted under and

by virtue of the General Laws of the State of Maryland, to wit: On the first day of September, eighteen hundred and ninety-one, and recorded in the office of the Secretary of State, on the eleventh day of September, eighteen hundred and ninety-one, be and the same is hereby amended so as to read as follows: That the name of the said corporation shall be "The Washington and Chesapeake Beach Railway Company," and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of equity and law, and may have a common seal, and alter the same at its pleasure; and its principal place of business shall be in the City of Washington, District of Columbia, and its principal office, in the State of Maryland, shall be at Chesapeake Beach.

Sec. 2. That the officers of said company shall consist of a president, vice-president, treasurer and secretary and a board of eleven directors; that said directors shall be chosen by the stockholders in annual meeting, which shall be held on the second Tuesday in January in each year, and the directors of said company, or a majority of them, shall have power to appoint judges of all elections by the stock-[fol. 268] holders, and to elect the officers of the company who may be chosen from the directors or others; but no officer nor director shall be chosen who is not a stockholder. The officers and directors of said company shall hold their respective positions for one year, or until their successors are duly elected and qualified; provided, however, that in case of a vacancy existing in said board from any cause, such vacancy can be filled for the unexpired term, by the duly qualified and acting members of the board, and in case of a vacancy existing in any of the said offices, such vacancy may be filled for the unexpired term of such officer in like manner as in case of a director; and provided, further, that a failure to hold an annual meeting of the stockholders, for the purpose of electing directors, or the failure to elect directors for one or more years shall not operate as a forfeiture of this charter, but the directors chosen for the preceding year shall continue to hold and exercise the office until such time as a new election shall be held according to the provisions of this Act.

MAPS ARE TOO LARGE TO BE FILMED

Sec. 3. That the board of directors shall have power to adopt such rules, regulations, resolutions and by-laws for the conduct and government of said company as may be by it deemed proper, and not inconsistent with the laws of the State of Maryland and the United States; provided, however, that no general meeting of the stockholders shall be called, except upon a call made by a majority vote of the board of directors or upon the demand of stockholders owning one-third in amount of the capital stock of the said company, who shall give notice in writing to the president, stating the object desired in holding such meeting; on receipt of which the president shall give thirty days' notice of such meeting, and the time and place thereof and the object of the call; and if at any such called meeting a majority, in value, of the stockholders are not present in person or by proxy, the meeting shall be adjourned from day to day without the transaction of any business, for any time [fol. 269] not exceeding three days, and if within three days, stockholders having a majority of stock outstanding shall not attend, the meeting shall be dissolved. All general meetings of the company shall be held at the place where the principal office of the company, for the transaction of the business, shall be located, and such meeting may be adjourned thence to meet at such place and at such time as may be found to be to the greatest convenience of the stockholders.

Sec. 4. That the said corporation is hereby authorized to locate, construct, equip, maintain and operate a continuous line of railway, with such number of tracks as the public's need demands, and a telegraph line, and all necessary sidings, stations, switches, turnouts and other devices, between the following points, to wit: Commencing at or near the point where the Baltimore and Potomac Railroad crosses Beaver Run, in Prince George's County, Maryland, near the northeast corner of the District of Columbia, and extending thence in a southeasterly direction through the counties of Prince George's, Anne Arundel and Calvert, to the Chesapeake Bay, at a place called "Chesapeake Beach" and "Plum Point;" with privilege of extending the western end of the said line to such point in the northerly line of the District of Columbia, as may be found necessary for the future interest of the public and said corporation, and with

the further privilege of constructing such docks, piers, bridges and retaining walls along the bay shore, as may be necessary.

Sec. 5. The capital stock of the said Washington and Chesapeake Beach Railway Company shall be one million dollars divided into twenty thousand shares of fifty dollars each. No certificate of stock shall be issued until the same shall have been fully paid up.

Sec. 6. That the said company may buy, lease or construct such depots, ticket offices, work-shops, engine-houses, warehouses and other structures at such points along its said line of railway, and the branches thereof as may be [fol. 270] required for the company's business. That it may receive by deed of gift, purchase, and hold such land as may be necessary for its line and terminal facilities, stations, yards and other purposes, along the line of its said railway, and may also purchase, own, hold, sell, lease or otherwise dispose of such lands and premises at the terminal at Chesapeake Bay as may be essential for the establishment at the said terminal of a permanent seaside resort, not exceeding in the aggregate three thousand acres.

Sec. 7. That at the annual meeting of the stockholders, the president and directors, in office for the preceding year, shall exhibit to the stockholders a clear and distinct statement of the affairs of said company; that at any called meeting of the stockholders, a majority of them present, in value, may require similar statements from the directors whose duty it shall be to furnish them when thus required, and at all general meetings of the stockholders, a majority, in value, of all the stockholders of the company, may remove from office the president or any of the directors of the company and elect others in their stead.

Sec. 8. That if at any time, the capital stock of the said company shall be found to be insufficient for the purposes of this Act, then the president and directors of the said company, may, from time to time, increase the stock of the said company by the addition of as many shares of stock as they may deem necessary, and may receive subscriptions to the same, or sell the same at a price not below their

par value, after giving at least thirty days' notice of the opening of the books for subscriptions, or of selling such shares; provided, that the president and directors shall not increase the said capital stock beyond the sum or amount of two millions dollars.

Sec. 9. That in all proceedings of the president and directors of the said company, the president shall have one vote, and all questions shall be decided by a majority of votes, and the said president and directors shall appoint [fol. 271] all and any such officers, engineers and agents, as they may consider necessary for the transaction of the business and the purposes of the company, and may dismiss or change the same at pleasure, and may fix and determine by general regulation or by special contract, the compensation of all such officers and others, and may determine the manner of settling and adjusting all accounts of any of the said officers against the company, and also the manner and evidence of transfers of the stock of the company.

Sec. 10. That the president and directors shall have power to borrow money for the purposes of this Act, and to issue bonds, certificates or other evidences of such loans, and to pledge the property of the company for the payment of the same and its interest.

Sec. 11. That the president and directors of said company shall be, and they are hereby invested with all the rights and powers necessary to the construction, working, use and repair of its said railroad, with such branches at any point of said railroad not exceeding twenty miles in length, as the said president and directors may determine; the said road when completed not to be more than sixty-six feet wide, except at or near its depots or stations, where the width may be made greater, with as many tracks as the president and directors may deem necessary, and the said president and directors may cause to be made, or may contract with others for making said railway, or any part of it, and they or their agents, or those with whom they may contract, or their agents, may enter upon and use and excavate any lands which may be wanted for the site of the said road, or the erection of warehouses or other works necessary for the said road, or for its construction or repair;

and that they may build bridges, fix scales and weights, lay rails, take and use earth, gravel, stone, timber or other materials which may be needed for the construction and repair of the said road or any of its works, and may make and construct all works whatever, which may be necessary or expedient in order to the proper completion and [fol. 272] maintenance of said road, and they may make or cause to be made, lateral railways in any direction whatever from the said railroad, and for the construction, repair and maintenance thereof, shall have all the rights and powers hereby given, in order to the construction and repair of the said principal railroad, and may also own and employ steamboats or other vessels to connect the said railroad or railroads with other points by water communication; provided, that nothing herein shall be construed to authorize the said company to take private property for their use without the compensation agreed upon by the company and the owners thereof, or awarded by a jury as hereinafter provided, being first paid or tendered to the party entitled to receive such compensation.

Sec. 12. That the said president and directors, or their agent or agents authorized by them, may agree with the owner or owners of any land, earth, gravel, stone, timber, streams or materials, or any improvements which may be wanted for the proper construction or repair of any of said roads, or for any of their works, for the purchase and use, and occupation or diversion of the same; and if they cannot agree, or if the owner or owners of any of them be an infant, feme covert, who is not possessed of the property to her sole and separate use, or authorized to contract in reference to the same, non compos mentis, or out of the county where such property wanted may lie when such property may be wanted, or for any other cause, be legally incapable of contracting, application may be made by the said company to any justice of the peace of such county, who shall thereupon issue his warrant under his hand and seal, to the sheriff of the county, requiring him to summon a jury of twenty of the inhabitants of said county above the age of twenty-one years, not related to the parties, nor in any wise interested, to meet on the lands or near the materials, or other property wanted, on a day named in said warrant, not less than ten nor more

than twenty days after issuing the same, and if at said [fol. 273] time and place any of the said jurors summoned do not attend, the sheriff shall immediately summon as many persons similarly qualified as together with those in attendance, will furnish a panel of twenty jurors in attendance: and from the panel each party, his, her, it or their agent, or attorney, or if either party be not present in person, or by agent, or being present in person or by agent, refuse to strike, the sheriff for him, her, it or them may strike off four persons and the remaining twelve shall act as the jury to the inquest of damages; and to each, before he acts as such juror, the sheriff shall administer an oath or affirmation, that he will justly and impartially value the damages, which the owner or owners will sustain by the use and occupation of the property required by the said company, and also the benefits or advantages to accrue to the owner or owners by the construction of the said road as a set-off to the said damages, but only in extinguishment of the claim for damages, and not for the actual value of the land, or other material taken; and after having made a fair and just offset of the advantages and disadvantages arising from the construction of the said railroad, they shall estimate and determine what amount of damages has been, or may be sustained by the said owner or owners, respectively; and the said jury shall reduce their inquisition to writing, and sign and seal the same, and it shall then be returned by the sheriff to the clerk of the Circuit Court for his county, and be filed by said clerk in his office, and shall be confirmed by said court at its next term or session, if no sufficient cause to the contrary be shown; and when confirmed shall be recorded by said clerk at the expense of the company, but if the same be set aside, the court shall direct another inquisition to be taken in the manner above described; and in case the second, or any other inquisition, which is confirmed by the court shall not award to the land owner a larger amount of damages than was awarded by the first inquisition, the court may, in its discretion, order the costs of the said second or other [fol. 274] inquisition, to be paid by the owner or owners of said land or materials condemned, and the inquisition shall in all cases describe the property taken, or the bounds of the lands condemned and the quality, or duration of the interest in the same, valued for the company; and such

valuation, when paid or tendered to the owner or owners of the property, his, her or their legal representatives, shall entitle the said company to the estate and interest in the same thus valued, as if it had been legally conveyed by the owner or owners of the same; and the valuation, if not received when tendered, may at any time thereafter be received without costs from said company by the owner or owners, his, her or their legal representatives. And the sheriff shall keep the said jury together for a reasonable time, until they shall agree upon and sign and seal the said inquisition; and in case it shall so happen that the jury cannot agree after being kept together as aforesaid, the sheriff may in his discretion, discharge the said jury, and without further warrant from a justice of the peace, shall within five days thereafter, summon another jury of twenty inhabitants, as aforesaid, not upon the former jury; and the same proceedings shall be had in all respects, as is hereinbefore provided; and in case of a second, or other disagreement of the jury, the same proceedings shall be had until a verdict or inquisition shall be made and returned as aforesaid.

Sec. 13. That whenever, in the construction of said road or roads it shall be necessary to cross or intersect any established road or way, the said president and directors shall so construct the said road across such established road or way, as not to impede the passage or transportation of persons or property along the same, and when it shall be necessary to pass through the lands of any individual, it shall also be their duty to provide for such individual, proper wagon ways across said road or roads, from one part of his land to the other.

Sec. 14. That said president and directors shall have [fol. 275] power to purchase, with the funds of the company, and place and use on any railroad constructed by them under this Act, all machines, vehicles or carriages of any description whatever, which they may deem proper for the purposes of transportation on the said road; they shall have power to charge for tolls upon and for the transportation of persons, goods, produce, merchandise or property of any description transported by them on said railroad or railroads, any sum not exceeding the following rates, that is to say: On all goods or merchandise or property trans-

ported, on said road or roads, not exceeding eight cents per ton, for both tolls and transportation for every mile the same may be transported, and for passengers not exceeding two cents per mile for each passenger, and it shall not be lawful for any person or persons, or for any corporate body to travel upon or use the roads of said company, or to transport any persons, merchandise or property of any description, upon or along the road or roads of the said company, without the license or permission of the president and directors of the said company.

Sec. 15. That a bell shall be placed on each locomotive engine and rung at the distance of at least one hundred rods from the place where the railroad shall cross any traveled public road or street, and be kept ringing until it shall have crossed such road or street, or a steam whistle shall be attached to each locomotive engine, and be sounded at least one hundred rods from the place where the railroad shall cross any such road, and shall be sounded at intervals until it shall have crossed such road or street, under the penalty of thirty dollars for the neglect of the provisions of this section, to be sued for before any justice of the peace of the election district or ward in which such neglect may happen, in ten days after such penalty was incurred, one-half thereof to go to the informer, and the other half to the county or city in which such neglect shall happen; [fol. 275½] and said company shall also be liable for all damages which shall be sustained by any person by reason of such neglect; and all penalties imposed by this Act may be sued for in the name of the State, and if such penalty shall be for a sum not exceeding one hundred dollars, then such suit may be brought before a justice of the peace, and may be commenced by serving a summons on any director, agent or engineer of said company.

Sec. 16. That the said board of directors shall, once in each year, or semi-annually declare and make such dividend as they may deem proper, of the net profits arising from the resources of the said company, first deducting the current and probable contingent expenses, and shall apportion the same among the stockholders of said company, in proportion to their respective shares.

Sec. 17. That in case any person shall wilfully obstruct, injure, impair or destroy any part of said road, or any of

the works, buildings, carriages, vehicles, engines or machines of said company, he, she, or they, for every such offence shall forfeit and pay to said company or their authorized agent or attorney, not less than fifty dollars, which may be recovered in the name of the said company, by an action of debt in the Circuit Court in the county wherein such offences shall be committed, and shall also be subject to indictment in said court and upon conviction of said offence, shall be punished by fine and imprisonment, in the discretion of the court.

Sec. 18. That if the said road shall not be commenced within one year from the passage of this Act, and shall not be finished in four years from the time of the commencement thereof, then this Act shall be null and void.

Sec. 19. That nothing in this Act shall be construed so as to authorize the said corporation to issue any note, scrip, device or any other evidence of debt to be used as a currency, and the Legislature hereby reserves the right to alter, amend or repeal this charter at its pleasure.

[fol. 276] Sec. 20. That the president and directors of said company shall have the power to issue bonds or certificates of indebtedness under the seal of said company, in such sum or sums, not less than one hundred dollars, as said company may prefer, and to sell and dispose of the same upon such terms as to said company may seem proper, and pledge the property and profits of the said company to secure the payment thereof, and also with power to convert the bonds so issued, into capital stock of said company, upon such terms as may be agreed upon, between the holder or holders of said bonds and said president and directors.

Sec. 21. That the president and directors of said company, shall have full power and authority to connect the railroad which may be constructed under the provisions of this Act, with any other railroad now existing, or which may hereafter be constructed, and also to make such contracts and arrangements with the president and directors of such railroads for the through transportation of passengers and merchandise, and all property of what kind soever, in the cars or carriages of either company, as may appear to said president and directors convenient and advantageous.

Sec. 22. This amendment shall not in anywise impair or render inoperative any part of said original charter or any act done by said company thereunder, nor in any wise interfere with any rights or claims created or grown up under and by virtue of said original charter.

Sec. 23. And be it enacted, That this Act shall take effect from the date of its passage.

Frank Brown, Governor. (The Great Seal of Maryland.) Murray Vandiver, Speaker of the House of Delegates, Edward Lloyd, President of the Senate.

Approved April 2nd, 1892.

[fol. 277] STATE OF MARYLAND, Set:

I, James A. Young, Clerk of the Court of Appeals of Maryland, do hereby certify, that the foregoing is a full and true copy of the Act of the General Assembly of Maryland of which it purports to be a copy, as taken from the Original Law, belonging to and deposited in the office of the Clerk of the Court of Appeals aforesaid.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the said Court of Appeals, this 12th day of November 1929.

James A. Young, Clerk of the Court of Appeals of Maryland. (Seal Court of Appeals, Maryland.)

[fol. 278] INTERSTATE COMMERCE COMMISSION

Finance Docket No. 8013

Date: 4/7/30.

APP. EXHIBIT No. 6

Witness: Rector

Chaney

Excerpt from Commission's Decision in Chesapeake Beach Ry. Co., 103 I. C. C. 67, at 68, 69

"Location and general description of property.—The railroad of Chesapeake Beach Railway Company, hereinafter called the carrier, is a single-track standard-gauge steam-operated railroad, extending from Chesapeake Beach,

Md., to Chesapeake Junction, D. C. The carrier owns that part of its line which is located in Maryland and leases from the Washington, Potomac & Chesapeake Railway Company that part located in the District of Columbia. The total mileage operated, both owned and leased, is as follows:

	Main tracks Miles	Yard track and sidings Miles	All tracks Miles
Owned, District Line, Md., to Chesapeake Beach, Md.	26.482	5.384	31.866
Leased, District Line, Md., to Chesapeake Junction, D. C.	2.047	0.450	2.497
Total used	28.529	5.834	34.363

Traffic Connections.—The railroad of the carrier connects with the Baltimore and Ohio Railroad at [illegible]peake Junction, D. C., and with the Philadelphia, Baltimore and Washington Railroad Company, a part of the Pennsylvania system, at Pennsylvania Junction, Md."

[fol. 279] [File endorsement omitted.]

[fol. 280] BEFORE INTERSTATE COMMERCE COMMISSION

Docket No. Finance 8013

In the Matter of the Application of the CHESAPEAKE BEACH RAILWAY COMPANY, under Paragraphs (18) to (21), Inclusive, Section 1 of the Interstate Commerce Act, as Amended, for a Certificate that the Present and Future Public Convenience and Necessity Require and will Require an Extension of its Line by Establishing and Operating a Ferry for the Transportation of Passengers and Property Between Chesapeake Beach in Calvert County, Maryland, across Chesapeake Bay, and a Point on Trippe's Bay in Dorchester County, Maryland.

PETITION FOR MODIFICATION OF COMMISSION'S REPORT, ORDER AND CERTIFICATE—Filed Sept. 2, 1930

The Claiborne-Annapolis Ferry Company respectfully petitions the Interstate Commerce Commission to modify the Report, Order and Certificate filed by it in the above entitled case on August 1st, 1930, and for cause says:

1. That the application filed in this case by the Chesapeake Beach Railway Company was for authority "to establish and operate, either directly or through a wholly owned subsidiary, a ferry for the transportation of passengers and property between the terminus of its said line [fol. 281] at Chesapeake Beach, across Chesapeake Bay, and a point on Trippe's Bay in Dorchester County, Maryland."

2. That all of the evidence produced by the applicant in support of its application was based upon a proposed ferry service and not upon an extension of railroad as contemplated by paragraph 18 of Section 1 of the Interstate Commerce Act.

3. That the applicant in this case, while referring to the proposed service as an extension of its railroad (applicant's brief in reply to Intervener's Exceptions to Report of Examiner, p. 6), yet the application and evidence in support thereof clearly indicate that the applicant proposes to establish a general ferry service, and apparently does not propose an extension of its line of railroad.

4. That your petitioner does not question the authority or the wisdom of this Honorable Commission in granting to the applicant a Certificate of Public Convenience and Necessity if the Commission construes the application of the Chesapeake Beach Railway Company in this case to be an application for a certificate authorizing an extension of its railroad.

5. That, although the jurisdiction of this Honorable Commission in this case is limited in law to the grant of authority to the applicant to extend its line of railroad across the Chesapeake Bay by means of vessels, the Report, Order and Certificate filed in this case on their face would seem to indicate that the Commission has attempted to grant to the applicant authority to operate a general ferry across the Chesapeake Bay between the points known as Chesapeake Beach, Calvert County, Maryland, and Trippe's Bay, Dorchester County, Maryland. While your petitioner does not suggest that this Honorable Commis- [fol. 282] sion has granted or attempted to grant to the applicant such a certificate, which could be granted only

by the State of Maryland, yet the use of the language by the Commission as follows:

"It is hereby certified, That the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company of ferry service across Chesapeake Bay, in Calvert and Dorchester Counties, Md., as set forth in the application and said report:"

is, we most respectfully submit, misleading and confusing.

Wherefore your petitioner prays the Commission to modify its Report, Order and Certificate in such manner as the Commission may deem best to remove any doubt that the permission granted the applicant is only for an extension of railroad and not for the establishment of a general ferry service.

And your petitioner further respectfully prays this Honorable Commission to grant a hearing on this petition so that oral argument may be had and your petitioner may be given an opportunity to present proof of the aforegoing allegations.

Respectfully submitted.

The Claiborne-Annapolis Ferry Company, Intervener, by Philip B. Perlman, Philip B. Perlman, Counsel.

Munsey Building, Baltimore, Maryland.

Dated August 14, 1930.

[fol. 283] [File endorsement omitted]

[fol. 284] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 8013

[Title omitted]

APPLICANT'S REPLY TO INTERVENER'S PETITION FOR MODIFICATION OF REPORT, ORDER AND CERTIFICATE—Filed Sept. 5, 1930.

Applicant in its original petition herein set forth in Paragraph III thereof that it—

"proposed to establish and operate, either directly or through a wholly owned subsidiary, a ferry for the trans-

portation of passengers and property between the terminus [fol. 285] of its said line at Chesapeake Beach, across Chesapeake Bay, and a point on Trippe's Bay in Dorchester County, Maryland",

and in Paragraph V thereof that—

"the present and future public convenience and necessity require the establishment of the proposed ferry so as to afford a direct route by rail and water between the City of Washington and surrounding territory and the eastern shore of Maryland, *and also provide a direct route for the transportation of automobiles and other vehicles between such points.*" (Italics new.)

and Paragraph VII thereof contained an appropriate reference to applicant's charter powers.

In accordance with the provisions of paragraph (19) of Section 1 of the Interstate Commerce Act, notice of application was given to and a copy filed with the Governor of the State of Maryland, with the right to be heard in respect of the matter.

In answer to the notice so given, the Public Service Commission of Maryland advised the Interstate Commerce Commission that it did not desire to make any representations in the proceeding (Examiner's Report, Sheet 1, ll 15-17).

Notice of the application was given to the Claiborne-Annaplois Ferry Company, the intervener herein, which operates a general ferry service between Annapolis and the eastern shore of Maryland, and that company filed a petition of intervention, opposing the application, alleging:

[fol. 286] "(a) That the ferry service proposed to be operated by applicant would interfere with and hamper its efforts to give adequate service on its route (Par. III), and

(b) That the present and future public convenience and necessity did not require the establishment of the proposed ferry" (Par. IV).

Upon the issue raised by the petition of intervention, the matter was set down for hearing before Examiner Ralph R. Molster and was tried upon the theory that the application was one for the extension of applicant's line by the establishment of a ferry which, in addition to

handling interstate traffic, would also handle intrastate traffic, consisting of the transportation of automobiles and other vehicles with their passengers. This was the only possible ground which the intervenor would have for opposing the application, as it was the only way by which the granting of the petition could "interfere with and hamper the efforts of the intervener to give adequate service on its route." In fact, the major portion of the testimony of intervener's sole witness, John M. Dennis, was devoted to the effect which applicant's proposed ferry service would have upon the intervener's business, which, as above stated, could not be affected unless applicant transported automobiles in intrastate traffic along with its business in interstate traffic.

Upon a consideration of the evidence produced before the Examiner the latter filed a report in which he recommended that the Commission find that the present and [fol. 287] future public convenience and necessity require the establishment by the applicant of ferry service across Chesapeake Beach *as proposed by the applicant* (Examiner's Report, Sheet 20, ll. 12-15). (Italics ours.)

That the intervener clearly understood the Examiner's report to recommend the granting of a certificate of public convenience and necessity for the extension of applicant's line of railroad, which would include what intervener calls a general ferry service, is established beyond question by the exceptions which intervener filed to the Examiner's proposed report, in which exceptions intervener claimed that:

"I. The Interstate Commerce Commission is not authorized by law to grant and issue a certificate of public convenience for the establishment of a *general ferry service* from point to point within a State.

II. The applicant has no authority under the provisions of its charter to engage in a *general ferry business.*" (Italics ours.)

Upon consideration thereof, the Commission (Division 4) filed its report herein, dated August 1, 1930, in which it specifically referred to intervener's two exceptions above referred to and said:

"Upon the facts disclosed in this record, we are of the opinion that we have jurisdiction in the premises."

Thereupon the Commission issued a certificate that the present and future public convenience and necessity re- [fol. 288] quire the establishment by the Chesapeake Beach Railway Company of ferry service across Chesapeake Bay as set forth in the application and said report.

The intervener now prays for what it terms a "modification" of the Commission's report, order and certificate, upon the theory that it is misleading and confusing in that it might be interpreted as conferring authority upon the applicant to operate a general ferry in connection with the extension of its line, whereas (so intervener's petition alleges) while the Commission did not grant or attempt to grant any such certificate to the applicant, still the report, order and certificate would seem to indicate that the Commission has attempted to grant the applicant authority to operate a general ferry. In other words, the intervener urges upon the Commission that the latter was unscientific in the use of the phraseology employed by it and that such phraseology might lead the average person to believe the Commission intended to grant the Chesapeake Beach Railway Company the right to transport automobiles and passengers in intrastate traffic when it intended just the contrary.

The language of the Commission's report, order and certificate, as well as that of the Examiner's proposed report, is so clear and unequivocal that it is difficult to see how anyone of ordinary intelligence can possibly mistake the meaning and the present attempt of the intervener to import into it an imaginary ambiguity naturally raises the question as to the intervener's object in so doing. It is our surmise that intervener is not seeking to have the Commission "modify" its report, order and certificate [fol. 289] by stating that it did not intend to give applicant the right to operate a general ferry as a part of its extension; but it is merely injecting the State of Maryland into the case for the purpose of securing a specific ruling in regard thereto. In this connection, we again direct attention to the fact that the Public Service Commission of Maryland has already advised the Commission that it did not desire to make any representations in this proceeding;—a position well taken in view of the limitations im-

posed upon the authority of the Public Service Commission of Maryland by the Public Service Commission Law (Chapter 180 of the Act of 1910), Section 53 of which law (Annotated Code of Maryland, Section 416), provides as follows:

"The provisions of this subtitle shall apply to services or utilities rendered by any of the corporations subject to the provisions of this subtitle, or any of the same, within the State of Maryland, *and nothing in this subtitle contained shall be deemed or construed to apply or operate upon interstate or foreign commerce.*" (Italics ours.)

This section was amended by Chapter 467 of the Laws of 1929 to read as follows:

"The provisions of this subtitle shall apply to services or utilities rendered by any of the corporations or persons subject to the provisions hereof, or any of the same, within the State of Maryland, *and shall not be so construed as to extend to any matter or thing which, under the Federal Constitution, the Congress of the United States has the exclusive power to regulate, or which the Congress of the* [fol. 290] *United States has, in conformity with the said Constitution, and in the exercise of its concurrent power, in fact regulated, to the exclusion of the concurrent power of the several States.*" (Italics ours.)

The foregoing statutory provisions are in consonance with the decisions of the United States Supreme Court in cases dealing with the conflict between state and federal power under the commerce clause of the constitution, notable among which were the Minnesota Rate Cases, 230 U. S. 352, where the Court said (at page 399):

"The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control of Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so inter-

woven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

In discussing the rights of states to notice in such cases, Mr. Justice Brandeis in Colorado v. United States (271 U. S. 153), said:

[fol. 291] "To ensure due consideration of the local interests, Congress provided that a copy of every application must be promptly filed with the Governor of the State directly affected, that notice of the application must be published in some local newspaper, and that the appropriate state authorities should have 'the right to make before the Commission such representations as they may deem just and proper for preserving the rights and interests of their people and the states, respectively, involved in such proceedings'."

Notice was accordingly given to the Governor of the State of Maryland under paragraph (19) of Section 1 of the Interstate Commerce Act, as hereinbefore set forth.

The intervener is in no position to challenge the authority of the Interstate Commerce Commission to grant a certificate covering a general ferry service in addition to interstate commerce. Such a question would involve a conflict between state and federal power and could be raised only by the State of Maryland. Assuming that such a question could have been raised in the instant case, the State of Maryland has had its day in court and having advised the Commission that it did not desire to make any representations in this proceeding, there is now an estoppel on the record in respect of any objections which could have been raised by it. [fol. 292] In conclusion, it is submitted that there is no ambiguity in the Commission's report, order or certificate and that intervener's application should be denied.

Respectfully submitted.

Chesapeake Beach Railway Company, Applicant, by George E. Holmes, 170 Broadway, New York, N. Y.; Harry C. Ames, Transportation Building, Washington, D. C. Harry C. Ames, Its Attorneys.

Dated, September 4, 1930.

[fol. 293] STATE OF NEW YORK,
County of New York, ss:

George Licsak, being duly sworn, says that on the 4th day of September, 1930, he served upon Philip B. Perlman, attorney for The Claiborne-Annapolis Ferry Company, the Intervener in the within proceeding, a copy of the within reply to Intervener's petition, by depositing the same in a United States Post-Office Mail Box in a securely sealed post-paid envelope addressed to said Philip B. Perlman, Munsey Building, Baltimore, Maryland.

George Licsak.

Sworn to before me this 4th day of September, 1930. (illegible), Notary Public. Kings County Clerk's No. 134. Kings County Reg. No. 2147. New York County Clerk's No. 352. New York County Reg. No. 2T235. Commission Expires March 30, 1932.

[fol. 294] BEFORE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 8013

CHESAPEAKE BEACH RY. CO. FERRY

ORDER DENYING PETITION FOR MODIFICATION—Oct. 13, 1930

Upon further consideration of the record in this proceeding, of the petition of the Claiborne-Annapolis Ferry Company for reopening of the proceeding for oral argument and for modification of the commission's report and certificate of public convenience and necessity herein, dated August 1, 1930, and of the reply of the Chesapeake Beach Railway Company to said petition:

It is ordered, That said petition be, and it is hereby, denied.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 295] Certificate to letter omitted in printing.

[fol. 295½] State of Maryland, Public Service Commission,
Munsey Building, Baltimore

Commissioners: Harold E. West, Chairman; J. Frank Harper, Steuart Purcell

Oct. 22, '30. 337,101.
Finance Docket 8013, Oct. 22, '30.

October 14, 1930.

Hon. B. H. Meyer, Interstate Commerce Commission, Washington, D. C.

DEAR SIR: The Public Service Commission of Maryland has received a copy of the brief of the Chesapeake Beach Railway Company in the matter of the proposed extension of its railway line between Washington, D. C. and Chesapeake Beach, Maryland, by the establishment of a ferry connecting with its railway line at Chesapeake Beach, and extending across the Chesapeake Bay to a point on Trippe's Bay in Dorchester County, Maryland.

When you advised this Commission of the application of the Chesapeake Beach Railway Company, the Commission, after receiving an opinion from its General Counsel, Hon. William Cabell Bruce, wrote you that the Commission had no representations to make in the matter.

The brief of the Company, now before me, states:

"Assuming that such a question could have been raised (the authority of the Interstate Commerce Commission to grant a certificate covering a general ferry service *in addition to interstate commerce*) in the instant case, the State of Maryland has had its day in court, and having advised the Commission that it did not desire to make any representations in this proceeding, there is now an estoppel on the record in respect to any objections which could have been raised by it."

That is not the view of this Commission at all. When this Commission advised you that it had no representations to make in the matter, it had before it an application for the extension of a railway line by the addition of a water connection, for the purposes of the railway's interstate

business. This Commission had not then, and has not now, any representations to make about any extensions, either by land or by water, which the Chesapeake Beach Railway Company may desire to make for interstate business. The opinion of our General Counsel was based on rulings of [fol. 296] the courts, and the statute law as to the Company's right to extend its line, subject to the approval of your Commission, for the carrying on of interstate operations. It did not waive its jurisdiction over commerce originating and terminating within the State, nor surrender any rights which the State of Maryland has, under the law or under the decisions of the courts, such as the right and the duty of passing upon an application for the establishment of a general ferry, and the fixing of the rates of such ferry, would be.

If the ferry proposed to be established by the Chesapeake Beach Railway Company is designed to be operated as part of its interstate line, carrying passengers, freight, railway cars or automobiles that form parts of its actual interstate operations as a railway, then this Commission has no representations to make. But if it is proposed to operate a ferry between two points in Maryland and carry passengers, freight and automobiles in an intrastate traffic which has no connection with the interstate business of the Company, then this Commission feels that the Interstate Commerce Commission has no authority to grant permission for such an operation, permission for which, if granted at all, must be obtained from the Public Service Commission of Maryland.

If it is the purpose of the Chesapeake Beach Railway Company to establish a general ferry for the handling of intrastate traffic, under the guise of making an extension of its interstate line, and without submitting its case to this Commission, then the Commission will be compelled to apply to the courts for the protection of its authority and the sovereignty of the state, in this matter.

Very sincerely, (Sgnd.) Harold E. West, Chairman.

HEW/MW.

Copy to George R. Holmes, 170 Broadway, N. Y.; Harry C. Ames, Transportation Building, Washington, D. C., Counsel for Chesapeake Beach Railway Co.

[fol. 297] IN SUPREME COURT OF THE UNITED STATES

ORDER ENLARGING TIME WITHIN WHICH TO DOCKET CASE AND FILE RECORD THEREOF IN THE SUPREME COURT OF THE UNITED STATES—Filed Aug 1, 1931

It appearing that in a proceeding in the Supreme Court of the District of Columbia described therein as Claiborne-Annapolis Ferry Company, Plaintiff, vs. United States of America, Chesapeake Beach Railway Company, Interstate Commerce Commission, et al, Defendants, in equity No. 52,254, a three Judge Court has heretofore denied plaintiff's injunction and dismissed its bill and it further appearing that plaintiff has prayed an appeal to the Supreme Court of the United States and that said appeal has been granted by the said Supreme Court of the District of Columbia and it appearing that further time is required to reduce to narrative statement the testimony and exhibits contain in the voluminous transcript of the record of the evidence and proceedings before the Interstate Commerce Commission, now a part of the record before the Supreme Court of the District of Columbia, and to assemble, prepare and certify the transcript of the record of said Court on said appeal, and for other good cause shown;

It is ordered that the time in which the Claiborne-Annapolis Ferry Company, plaintiff below, shall furnish, serve [fols. 298-301] and file in the office of the Clerk of the Supreme Court of the District of Columbia its narrative statement of the evidence offered before the Supreme Court of the District of Columbia and its designation for the record of additional appeal papers which have been filed, and in which to cause the transcript of the record to be completed, and in which to docket the case and file the record thereof with the Clerk of the Supreme Court of the United States, be, and it is hereby, enlarged to and including October 17, 1931.

Pierce Butler, Justice Supreme Court of the United States.

July 30, 1931.

Consent.

Elmer B. Collins, Attorney for United States. J. Stanley Payne, Attorney for Interstate Commerce Commission. Jonathan C. Gibson, Attorney for Chesapeake Beach Railway Company. Jesse Miller, George E. Edelin, Attorneys for Claiborne-Annapolis Ferry Company.

[fol. 302] [File endorsement omitted.]

[fol. 303] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS FOR APPELLANT—Filed Oct. 27, 1931

Now comes appellant, Claiborne-Annapolis Ferry Company, by counsel, and in compliance with Rule 13 of this Court, files the following statement of points upon which it will rely in this appeal:

I

That, where it appears that a certificate of public convenience and necessity issued by the Interstate Commerce Commission upon the application of the appellee carrier under the pretended authority of Section 1, Paragraph 18, of the Interstate Commerce Act as amended by the Transportation Act (41 Stat. 456; U. S. C. Tit. 49 (18)) is void and, unless the same be set aside and annulled, appellant (an intervener before the Interstate Commerce Commission) will suffer great and irreparable legal damage, said certificate should be set aside and annulled in an action brought for that purpose.

II

That, under the circumstance set out in Point I, supra, appellant had the right and was the proper party to maintain this action.

[fol. 304]

III

That, unless said certificate of public convenience and necessity is set aside and annulled, appellant will suffer great and irreparable legal damage.

IV

That the certificate of public convenience and necessity is void in that.

(a) The only authority of the Interstate Commerce Commission for the issuance of said certificate was upon a showing that public convenience and necessity required or would require the establishment and operation of a ferry "to be used by or in connection with" said railroad.

(b) There was no substantial evidence, and in fact no evidence whatsoever, either before the Interstate Commerce Commission or the three-judge Court below, to show that public convenience and/or necessity required or would require the establishment or operation of a ferry "to be used by or in connection with" the railroad of the Chesapeake Beach Railway Company.

(c) The only evidence of public convenience and necessity, if any, shown by the testimony before the Interstate Commerce Commission and the Court below was for the operation of a general or vehicular ferry between two points entirely within the State of Maryland and wholly unconnected with and not to be used by the railroad of the Chesapeake Beach Railway Company.

(d) The Interstate Commerce Commission was without authority under Section 1, Paragraphs 18 and 3 of the Interstate Commerce Act, as amended, to issue a certificate of public convenience and necessity for the operation of a general or vericular ferry between two points entirely within the State of Maryland where there was no showing [fol. 305] that public convenience or necessity required or would require the operation of such ferry for use by or in connection with the railroad of the appellee, Chesapeake Beach Railway Company.

(e) If such authority could be deduced from the language of Section 1, Paragraphs 18 and 3, of the Interstate Commerce Act, as amended, then said Act, in so far as it attempts to confer such authority on the Interstate Commerce Commission, is unconstitutional, null and void.

V

That the three-judge Court erred in failing to find that the certificate of the Interstate Commerce Commission at-

tempted to grant authority to the appellee railway company to operate a general or vehicular ferry.

VI

That the three-judge Court erred in construing the certificate of the Interstate Commerce Commission as authorizing the appellee railway company "to extend its rail line" by ferry.

VII

That the appellee, Chesapeake Beach Railway Company, had and has no authority under its charter to operate a general or vehicular ferry.

VIII

That, whereas the three-judge Court held with appellant that the Supreme Court of the District of Columbia is a District Court of the United States for jurisdictional purposes in this action, nevertheless, appellant reserves the right to discuss this question should it be raised on appeal by appellees.

[fols. 306 & 307] IX

The special three-judge Court erred in holding that there was substantial evidence before the Interstate Commerce Commission or before it to support the findings and certificate of the Interstate Commerce Commission and the said Court further erred in refusing to set aside and annul said certificate and in dismissing appellant's bill.

Philip B. Perlman, Jesse I. Miller, George E. Edelin, Attorneys for Appellant.

Service accepted.

Nelson Thomas, Attorney for Interstate Commerce Commission. J. C. Gibson, Attorney for Chesapeake Beach Railway Company. Thomas D. Thacher (J.), Solicitor General of the U. S.

[fol. 308] [File endorsement omitted.]

[fol. 309] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION OF RECORD AND STIPULATION—Filed Oct. 28, 1931

Now come the parties hereto by their respective counsel and designate for printing the following portions of the record and, in addition thereto, stipulate and agree as hereinafter set out concerning certain porfions of the record not to be printed:

Print the following portions of the record:

A. Transcript—Index and pages 1 to 84, inclusive.

B. Narrative abstract of testimony, pages 1 to 71, inclusive.

C. Exhibits, as follows:

1. Certificate of Clerk of Supreme Court of District of Columbia transmitting Exhibits.

2. Pages 1 to 5, Application of Chesapeake Beach Railway Company to Interstate Commerce Commission.

3. Page 7, "Return to Question-aire." (In the paging of Exhibits, all of the said "Return to Question-aire", which comprises a printed volume with exhibits, has been numbered "Page 7". All of said "Return to Question-aire" is to be printed except Exhibits 5, 17 and 18 thereof.)

4. Pages 8 to 11, inclusive, Claiborne-Annapolis Ferry [fol. 310] Company's intervening petition to Interstate Commerce Commission.

5. Pages 12 to 23, inclusive, charter of Washington and Chesapeake Beach Railway Company.

6. Page 49, excerpt from Interstate Commerce Commission's decision reported in 103 I. C. C. 67-69.

7. Pages 138 to 141, inclusive, Claiborne-Annapolis Ferry Company's petition to Interstate Commerce Commission for modification of order.

8. Pages 142 to 152, Chesapeake Beach Railway Company's reply to above-mentioned petition.

9. Page 153, order of Interstate Commerce Commission denying petition for modification.

10. Pages 154 to 156, inclusive, letter of Maryland Public Service Commission to Interstate Commerce Commission and certificate attached thereto.

As to certain portions of the Exhibits not appearing in the above designation, the parties stipulate and agree as follows:

1. In lieu of printing Exhibit 18, in "Return to Question-aire", the parties stipulate that the War Department has issued a permit to the Chesapeake Beach Railway Company for the construction, dredging and other work affecting navigation which will be necessary if the proposed ferry is finally authorized and established.

2. In lieu of printing Pages 24 to 48, inclusive, of the Exhibits, the parties stipulate and agree that the Chesapeake Beach Railway Company, one of the appellees herein, is the successor to the original charter rights of the Washington and Chesapeake Beach Railway Company and is the present owner of the property of said predecessor company.

3. In lieu of printing pages 50 to 60, inclusive, of the Exhibits, the parties stipulate and agree that the Chesapeake [fol. 311] Beach Railway Company publishes and has on file with the Interstate Commerce Commission schedules of freight and passenger tariffs and concurrences with other railroads engaged in interstate commerce as to local and interstate rates.

4. In lieu of printing pages 62 to 125, inclusive, of the Exhibits, the parties stipulate and agree as follows:

That the annual reports filed by the Claiborne-Annapolis Ferry Company with the Maryland Public Service Commission show the following entries, among others:

Operating revenues from——

	Passenger traffic	Vehicular traffic	Freight traffic
1922	$53,306.57	Nothing	$812.84
1923	62,584.31	$59,378.75	112.59
1924	77,697.15	78,241.70	Nothing
1925	87,394.30	96,491.00	190.42
1926	94,045.00	113,860.50	318.79
1927	114,374.40	138,341.00	201.38
1928	124,707.07	160,206.30	Nothing
1929	143,003.00	189,630.00	Nothing

That other material portions of said annual reports appear on Appendix I, attached hereto.

5. The parties stipulate and agree that the report and order of the Interstate Commerce Commission, which this proceeding attacks, and which appears on pages 126 to 137, inclusive, of the Exhibits, is identical with Exhibit A of the motion to dismiss and answer of the Interstate Commerce Commission filed in the lower Court and that said Exhibit A to said motion to dismiss and answer is and may be considered as the findings and order of the said Interstate Commerce Commission upon which this proceeding is based.

6. It is stipulated and agreed by the parties that the originals of all Exhibits may be considered as a part of the [fol. 312] record before this Court and may be referred to and used by counsel or by the Court.

Jesse I. Miller, Philip B. Perlman, George E. Edelin, Attorneys for Appellant. Elmer B. Collins, Special Assistant to the Attorney General *General* of the U. S. Nelson Thomas, Attorney for Interstate Commerce Commission. Jonathan C. Gibson, Attorney for Chesapeake Beach Railway Company.

[fol. 313] EXCERPTS FROM ANNUAL REPORTS OF THE CLAIBORNE-ANNAPOLIS FERRY COMPANY TO THE PUBLIC SERVICE COMMISSION OF MARYLAND

Appendix I to Designation of Record and Stipulation

(Here follows comparative general balance sheet, side folios 314 and 315)

[fol. 314]

From the 1922 Report

Comparative General Balance Sheet (Page 3 of the Report)

	Asset or debit side					Liability or credit side			
Line No.	Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Balance at beginning of year	Item	Balance at close of year	Compa preced (increase decreas
1	$1,454.05	Cash*	$8,004.82	$6,550.77	.....	Taxes accrued and unpaid	.....	....
2	.....	Bills receivable	.....	.....	.....	Interest accrued on funded debt	.....	....
3	.....	Accounts receivable	.....	.....	.....	Interest accrued on unfunded debt	.....	....
4	.....	Other current assets	.....	.....	.....	Judgments unpaid	.....	....
5	1,454.05	Total Current Assets	8,004.82	6,550.77	.....	Receivers' certificates	.....	....
6	.....	Materials and supplies on hand	.....	.....	5,175.00	Bills payable	$4,300.00	x $
7	.....	.....	.....	.....	16,062.72	Accounts payable	10,639.38	x 5,
8	1,454.05	Total Floating Capital	8,004.82	6,550.77	.....	Salaries and wages unpaid	.....	....
					.....	Dividends payable	.....	....
10	197,310.60	Fixed Capital (page 5)	199,010.60	1,700.00	71,358.37	Other unfunded debt # E. C. Horr, Atty	71,358.37	....
11					92,596.09	Total unfunded Debt	86,297.75	....
[fol. 315]								
12	.....	.....	.....	.....	.....	.....	.....	....
13	.....	.....	.....	.....	$100,000.00	Funded Debt, page 4	$100,000.00	....
14	$1,500.00	Investments	$944.26	x $ 555.74				
15	33,086.80	Sinking funds, invested	41,366.89	8,280.09	192,596.09	Total Debt	186,297.75	....
16	20.56	Sinking funds, uninvested Inv	2,992.23	2,971.67	.....	Reserve for Accrued Depreciation	.....	....
17	.....	Special deposits	.....	.....	.....	Sinking fund reserves	.....	....
18	28,763.11	Prepayments	28,313.11	x 450.00	9,916.16	Other reserves	20,017.31	10
19	.....	Suspense#	.....	.....	.....	.....	.....	....
20	.....	Deferred charges#	.....	.....	290,055.00	Common stock, page 4	290,375.00	
21	.....	.....	.....	31,598.33	.....	Preferred stock, page 4	.....	....
22	262,135.12	Totals	280,631.91	18,496.79	.....	Totals	.....	....
23	230,482.13	Corporate deficit	216,058.15	x 14,423.98	.....	Corporate Surplus	.....	....
24	492,617.25	Grand Total, Asset Side	496,690.06	4,072.81	492,617.25	Grand Total, Liability Side	496,690.06	4
				17,114.35				

x Red Ink figures.

* Include in this item "Cash" not only money, but also bank credit subject to demand, checks and sight drafts.

Harrington } 5%
Lincoln }

From the 1922 Report

Comparative General Balance Sheet (Page 3 of the Report)

Asset or debit side				Liability or credit side			
Balance beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)
$1,454.05	Cash*	$8,004.82	$6,550.77	.....	Taxes accrued and unpaid	.....	.....
.....	Bills receivable	.....	.....	.....	Interest accrued on funded debt	.....	.....
.....	Accounts receivable	.....	.....	.....	Interest accrued on unfunded debt	.....	.....
.....	Other current assets	.....	.....	.....	Judgments unpaid	.....	.....
1,454.05	Total Current Assets	8,004.82	6,550.77	.....	Receivers' certificates	.....	.....
.....	Materials and supplies on hand	.....	.....	5,175.00	Bills payable	$4,300.00	x $875.00
.....	.....	.....	.....	16,062.72	Accounts payable	10,639.38	x 5,423.34
1,454.05	Total Floating Capital	8,004.82	6,550.77	.....	Salaries and wages unpaid	.....	.....
				.....	Dividends payable	.....	.....
97,310.60	Fixed Capital (page 5)	199,010.60	1,700.00	71,358.37	Other unfunded debt # E. C. Horr, Atty	71,358.37	.....
				92,596.09	Total unfunded Debt	86,297.75	.....
.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	$100,000.00	Funded Debt, page 4	$100,000.00	.....
$1,500.00	Investments	$944.26	x $ 555.74				
33,086.80	Sinking funds, invested	41,366.89	8,280.09	192,596.09	Total Debt	186,297.75	.....
20.56	Sinking funds, uninvested Inv	2,992.23	2,971.67	.....	Reserve for Accrued Depreciation	.....	.....
.....	Special deposits	.....	.....	.....	Sinking fund reserves	.....	.....
28,763.11	Prepayments	28,313.11	x 450.00	9,916.16	Other reserves	20,017.31	10,051.15
.....	Suspense#	.....	.....	.....	.....	.....	.....
.....	Deferred charges#	.....	.....	290,055.00	Common stock, page 4	290,375.00	320.00
.....	.....	.....	31,598.33	.....	Preferred stock, page 4	.....	.....
262,135.12	Totals	280,631.91	18,496.79	.....	Totals	.....	.....
230,482.13	Corporate deficit	216,058.15	x 14,423.98	.....	Corporate Surplus	.....	.....
492,617.25	Grand Total, Asset Side	496,690.06	4,072.81	492,617.25	Grand Total, Liability Side	496,690.06	4,072.81
			17,114.35				

Harrington } 5%
Lincoln }

k figures.
in this item "Cash" not only money, but also bank credit subject to demand, checks and sight drafts.

[fol. 316] Statement of Fixed Capital, December 31, 1922
(Page 5 of Report)

Pier and Wharf Property	$750.63
Steamers	192,234.69
Marine Equipment	2,155.15
Furniture and Fixtures on Steamboats	3,132.31
Electric Light Plant—Claiborne	737.82
Totals	$199,010.60

Operating Revenues and Expenses (Page 6 of Report)

Revenues	$104,286.45
Expenses	105,761.81
Deficit for year for operating	$1,475.36

Operating expenses above stated include depreciation, $10,051.15, interest, $5,020.96, and Repairs, $13,457.38.

[fol. 317] (Here follows comparative general balance sheet, side folios 318 and 319)

[fol. 318]

From the 1923 Report

Comparative General Balance Sheet (Page 3 of the Report)

Line No.	Asset or debit side: Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Liability or credit side: Balance at beginning of year	Item	Balance at close of year	Compa preced (increase decreas
	$ c		$ c	$ c	$ c		$ c	$
1	8,004.82	Cash*	8,643.05	638.23	.....	Taxes accrued and unpaid	.....	...
2	.....	Bills receivable	.....	.....	.....	Interest accrued on funded debt	.....	...
3	.....	Accounts receivable	87.30	87.30	.....	Interest accrued on unfunded debt	.....	...
4	.....	Other current assets	.....	.....	.....	Judgments unpaid	.....	...
5	8,004.82	Total Current Assets	8,730.35	725.53	.....	Receivers' Certificates	.....	...
6	.....	Materials and supplies on hand	.....	.....	4,300.00	Bills payable	22,282.00	17
7	.....	.....	.....	.....	10,639.38	Accounts payable	32,012.61	21
8	8,004.82	Total Floating Capital	8,730.35	725.53	.....	Salaries and wages unpaid	.....	...
9	.....	.....	.....	.....	.....	Dividends payable	.....	...
10	199,010.60	Fixed Capital (page 5)	255,168.24	56,157.64	71,358.37	Other unfunded debt*	71,358.37	...
11	.....	.....	.....	.....	86,297.75	Total Unfunded Debt	125,652.98	39
12								
13	.....	.....	.....	.....	100,000.00	Funded Debt, page 4	100,000.00	...
14	944.26	Investments	909.01	x 35.25	.....	.....	.....	...
15	41,366.89	Sinking funds, invested	55,839.39	14,472.50	186,297.75	Total Debt	225,652.98	39
[fol. 319]								
16	2,992.23	Sinking funds, uninvested	1,886.00	x 1,106.23	.....	Reserve for Accrued Depreciation	.....	...
17	.....	Special deposits	.....	.....	.....	Sinking fund reserves	.....	...
18	28,313.11	Prepayments	28,522.01	208.90	20,017.31	Depreciation	31,894.54	11
19	.....	Suspense*	.....	.....	.....	.....	.....	...
20	.....	.....	.....	.....	290,375.00	Common stock, page 4	290,675.00	
21	.....	.....	.....	.....	.....	Preferred stock, page 4	.....	...
22	280,631.91	Totals	351,055.00	70,423.09	.....	Totals	.....	...
23	216,058.15	Corporate deficit	197,167.52	x 18,890.63	.....	Corporate Surplus	.....	...
24	496,690.06	Grand Total, Asset Side	548,222.52	51,532.46	496,690.06	Grand Total, Liability Side	548,222.52	51

x Red ink figures.

From the 1923 Report

Comparative General Balance Sheet (Page 3 of the Report)

Asset or debit side					Liability or credit side		
Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)
$ c		$ c	$ c	$ c		$ c	$ c
8,004.82	Cash*	8,643.05	638.23	.....	Taxes accrued and unpaid	.....	.....
.....	Bills receivable	.....	.....	.....	Interest accrued on funded debt	.....	.....
.....	Accounts receivable	87.30	87.30	.....	Interest accrued on unfunded debt	.....	.....
.....	Other current assets	.....	.....	.....	Judgments unpaid	.....	.....
8,004.82	Total Current Assets	8,730.35	725.53	.....	Receivers' Certificates	.....	.....
.....	Materials and supplies on hand	.....	.....	4,300.00	Bills payable	22,282.00	17,982.00
.....	.....	.....	.....	10,639.38	Accounts payable	32,012.61	21,373.23
8,004.82	Total Floating Capital	8,730.35	725.53	.....	Salaries and wages unpaid	.....	.....
.....	.....	.....	.....	.....	Dividends payable	.....	.....
199,010.60	Fixed Capital (page 5)	255,168.24	56,157.64	71,358.37	Other unfunded debt*	71,358.37	.....
.....	.....	.....	.....	86,297.75	Total Unfunded Debt	125,652.98	39,355.23
.....	.....	.....	.....	100,000.00	Funded Debt, page 4	100,000.00	.....
944.26	Investments	909.01	x 35.25	.....	.....	.....	.....
41,366.89	Sinking funds, invested	55,839.39	14,472.50	186,297.75	Total Debt	225,652.98	39,355.23
2,992.23	Sinking funds, uninvested	1,886.00	x 1,106.23	.....	Reserve for Accrued Depreciation	.....	.....
.....	Special deposits	.....	.....	.....	Sinking fund reserves	.....	.....
28,313.11	Prepayments	28,522.01	208.90	20,017.31	Depreciation	31,894.54	11,877.23
.....	Suspense*	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	290,375.00	Common stock, page 4	290,675.00	300.00
.....	.....	.....	.....	.....	Preferred stock, page 4	.....	.....
280,631.91	Totals	351,055.00	70,423.09	.....	Totals	.....	.....
216,058.15	Corporate deficit	197,167.52	x 18,890.63	.....	Corporate Surplus	.....	.....
496,690.06	Grand Total, Asset Side	548,222.52	51,532.46	496,690.06	Grand Total, Liability Side	548,222.52	51,532.46

*d ink figures.

[fol. 320] Statement of Fixed Capital, December 31, 1923
(Page 5 of Report)

Pier and Wharf Property—Annapolis	$750.63
Marine Equipment on Steamers	3,014.74
Electric Light Plant—Claiborne	737.82
Steamers	274,532.74
Furniture and Fixtures on Steamers	3,132.31
Totals	255,168.24

Operating Revenues and Expenses (Page 6 of Report)

Total revenues	$123,408.89
Operating Expenses	126,718.26
Deficit for year from operating	3,309.37

The operating expenses above stated include depreciation, $11,877.23, interest, $4,029, and Repairs, $27,176.41.

[fol. 321] (Here follows comparative general balance sheet, side folios 322 and 323)

[fol. 322]

From the 1924 Report

Comparative General Balance Sheet (Page 3 of Report)

Line No.	Asset or debit side: Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Liability or credit side: Balance at beginning of year	Item	Balance at close of year	Comp prec (increa decre
	$ c		$ c	$ c	$ c		$ c	$
1	8,643.05	Cash*	27,815.92	19,172.87	.....	Taxes accrued and unpaid	.....	..
2	.....	Bills receivable	5,000.00	5,000.00	.....	Interest accrued on funded debt	.....	..
3	87.30	Accounts receivable	632.20	544.90	.....	Interest accrued on unfunded debt	.....	..
4	.....	Other current assets	.....	.....	.....	Judgements unpaid	.....	..
5	8,730.35	Total Current Assets	33,448.12	24,717.77	.....	Receivers' certificates	.....	..
6	.....	Materials and supplies on hand	.....	.....	22,282.00	Bills payable	8,000.00	x 1
7	.....	.....	.....	.....	32,012.61	Accounts payable	26,933.18	x
8	8,730.35	Total Floating Capital	33,448.12	24,717.77	.....	Salaries and wages unpaid	.....	..
9	.....	.....	.....	.....	.....	Dividends payable	.....	..
10	255,168.24	Fixed Capital (page 5)	227,032.30	x 28,135.94	71,358.37	Other unfunded debt*	71,358.37	..
11	.....	.....	.....	.....	125,652.98	Total Unfunded Debt	106,291.55	x 1
12	.....	.....	.....	.....	.....	.....	.....	..
13	.....	.....	.....	.....	100,000.00	Funded Debt, page 4	100,000.00	..
14	909.01	Investments	.....	x 909.01	.....	.....	.....	..
15	55,839.39	Sinking funds, invested	67,888.14	12,048.75	225,652.98	Total Debt	206,291.55	x 1
[fol. 323]								
16	1,886.00	Sinking funds, uninvested	4,485.73	2,599.78	.....	Reserve for Accrued Depreciation	.....	..
17	.....	Special deposits	.....	.....	31,894.54	Sinking fund reserves	38,994.46	
18	28,522.01	Prepayments	30,442.34	2,920.23	.....	Other reserves	.....	..
19	.....	Suspense*	.....	.....	.....	.....	.....	..
20	.....	Deferred charges¶	.....	.....	290,675.00	Common stock, page 4	290,675.00	..
21	.....	.....	.....	.....	.....	Preferred stock, page 4	.....	..
22	351,055.00	Totals	363,296.68	12,241.68	548,222.52	Totals	535,961.01	x 1
23	197,167.52	Corporate deficit	172,664.33	x 24,503.19	.....	Corporate Surplus	.....	..
24	548,222.52	Grand Total, Asset Side	535,961.01	x 12,261.51	548,222.52	Grand Total, Liability Side	535,961.01	x 1

x Red ink figures.

* Include in this item "Cash" not only money, but also bank credit subject to demand, checks and sight drafts.

22] From the 1924 Report

Comparative General Balance Sheet (Page 3 of Report)

Asset or debit side				Liability or credit side			
Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)
$ c		$ c	$ c	$ c		$ c	$ c
8,643.05	Cash*	27,815.92	19,172.87	.....	Taxes accrued and unpaid	.....	.....
.....	Bills receivable	5,000.00	5,000.00	.....	Interest accrued on funded debt	.....	.....
87.30	Accounts receivable	632.20	544.90	.....	Interest accrued on unfunded debt	.....	.....
.....	Other current assets	.....	.....	.....	Judgements unpaid	.....	.....
8,730.35	Total Current Assets	33,448.12	24,717.77	.....	Receivers' certificates	.....	.....
.....	Materials and supplies on hand	.....	.....	22,282.00	Bills payable	8,000.00	x 14,282.00
.....	.....	.....	.....	32,012.61	Accounts payable	26,933.18	x 5,079.43
8,730.35	Total Floating Capital	33,448.12	24,717.77	.....	Salaries and wages unpaid	.....	.....
.....	.....	.....	.....	.....	Dividends payable	.....	.....
255,168.24	Fixed Capital (page 5)	227,032.30	x 28,135.94	71,358.37	Other unfunded debt¶	71,358.37	.....
.....	.....	.....	.....	125,652.98	Total Unfunded Debt	106,291.55	x 19,361.43
.....	.....	.....	.....	.....	.....	.....	.....
.....	.....	.....	.....	100,000.00	Funded Debt, page 4	100,000.00	.....
909.01	Investments	.....	x 909.01	.....	.....	.....	.....
55,839.39	Sinking funds, invested	67,888.14	12,048.75	225,652.98	Total Debt	206,291.55	x 19,361.43
23] 1,886.00	Sinking funds, uninvested	4,485.73	2,599.78	.....	Reserve for Accrued Depreciation	.....	.....
.....	Special deposits	.....	.....	31,894.54	Sinking fund reserves	38,994.46	7,099.92
28,522.01	Prepayments	30,442.34	2,920.23	.....	Other reserves	.....	.....
.....	Suspense¶	.....	.....	.....	.....	.....	.....
.....	Deferred charges¶	.....	.....	290,675.00	Common stock, page 4	290,675.00	.....
.....	.....	.....	.....	.....	Preferred stock, page 4	.....	.....
351,055.00	Totals	363,296.68	12,241.68	548,222.52	Totals	535,961.01	x 12,261.51
197,167.52	Corporate deficit	172,664.33	x 24,503.19	.....	Corporate Surplus	.....	.....
548,222.52	Grand Total, Asset Side	535,961.01	x 12,261.51	548,222.52	Grand Total, Liability Side	535,961.01	x 12,261.51

Red ink figures.

Include in this item "Cash" not only money, but also bank credit subject to demand, checks and sight drafts.

[fol. 324] Capital Stocks and Funded Debt (Page 4 of Report)

Capital stock of no par value—60,000 shares.
Authorized and mortgage bonds issued in 1919—100,000.

Fixed Capital, December 31, 1924 (Page 5 of Report)

Pier and wharf property—Annapolis	$750.63
Marine Equipment	2,108.04
Steamers (2)	223,435.81
Electric Light Plant—Claiborne	737.82
Totals	227,032.30

Operating Revenues and Expenses (Page 6 of Report)

Total operating revenues	$157,272.11
Operating expenses	129,675.48

Depreciation $11,451.48 and profit of $16,145.15 were charged to operating expenses, thereby balancing the account. Interest, $4,358.73, and Repairs, $35,630.15, also included in operating expenses.

[fol. 325] (Here follows comparative general balance sheet, side folios 326 and 327)

[fol. 326]

From the 1925 Report

Comparative General Balance Sheet (Page 3 of Report)

Line No.	Asset or debit side: Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Liability or credit side: Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)
	$ c		$ c	$ c	$ c		$ c	$
1	17,815.92	Cash*	48,122.07	20,306.15		Taxes accrued and unpaid		
2	632.20	Bills receivable	32.65	x 599.55		Interest accrued on funded debt		
3	5,000.00	Accounts receivable		x 5,000.00		Interest accrued on unfunded debt		
4		Other current assets				Judgments unpaid		
5	33,448.12	Total Current Assets	48,154.72	14,706.60		Receivers' Certificates		
6		Materials and supplies on hand			8,000.00	Bills payable		x 8,
7					26,933.18	Accounts payable	15,982.95	x 11,
8	33,448.12	Total Floating Capital	48,154.72	14,706.60		Salaries and wages unpaid		
9						Dividends payable		
10	227,032.30	Fixed Capital (page 5)	227,032.30		71,358.37	Other unfunded debt#	71,358.37	
11					106,291.55	Total Unfunded Debt	87,291.32	x 19,
12								
13					100,000.00	Funded Debt, page 4	100,000.00	
14		Investments						
[fol. 327]								
15	67,888.14	Sinking funds, invested	76,718.14	8,830.00	206,291.55	Total Debt	187,291.32	x 19,
16	4,485.78	Sinking funds, uninvested	11,938.44	7,452.66		Reserve for Accrued Depreciation		
17		Special deposits				Sinking fund reserves		
18	30,442.34	Prepayments	26,363.11	x 4,079.23	38,994.46	Other reserves Depreciation	50,445.94	11
19		Suspense#						
20		Deferred charges#			290,675.00	Common stock, page 4	290,675.00	
21						Preferred stock, page 4		
22	363,296.68	Totals	390,206.71	26,910.03		Totals		
23	172,664.33	Corporate deficit	138,205.55	x 34,458.78		Corporate surplus		
24	535,961.01	Grand Total, Asset Side	528,412.26	x 7,548.75	535,961.01	Grand Total, Liability Side	528,412.26	x 7

x Red ink figures.

* Include in this item "cash" not only money, but also bank credit subject to demand, checks and sight drafts.

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From the 1925 Report

Comparative General Balance Sheet (Page 3 of Report)

Asset or debit side				Liability or credit side			
Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)
$ c		$ c	$ c	$ c		$ c	$ c
17,815.92	Cash*	48,122.07	20,306.15		Taxes accrued and unpaid		
632.20	Bills receivable	32.65	x 599.55		Interest accrued on funded debt		
5,000.00	Accounts receivable		x 5,000.00		Interest accrued on unfunded debt		
	Other current assets				Judgments unpaid		
33,448.12	Total Current Assets	48,154.72	14,706.60		Receivers' Certificates		
	Materials and supplies on hand			8,000.00	Bills payable		x 8,000.00
				26,933.18	Accounts payable	15,932.95	x 11,000.23
33,448.12	Total Floating Capital	48,154.72	14,706.60		Salaries and wages unpaid		
					Dividends payable		
227,032.30	Fixed Capital (page 5)	227,032.30		71,358.37	Other unfunded debt#	71,358.37	
				106,291.55	Total Unfunded Debt	87,291.32	x 19,000.23
	Investments			100,000.00	Funded Debt, page 4	100,000.00	
327]							
67,888.14	Sinking funds, invested	76,718.14	8,830.00	206,291.55	Total Debt	187,291.32	x 19,000.23
4,485.78	Sinking funds, uninvested	11,938.44	7,452.66		Reserve for Accrued Depreciation		
	Special deposits				Sinking fund reserves		
30,442.34	Prepayments	26,363.11	x 4,079.23	38,994.46	Other reserves Depreciation	50,445.94	11,451.48
	Suspense#						
	Deferred charges#			290,675.00	Common stock, page 4	290,675.00	
					Preferred stock, page 4		
363,296.68	Totals	390,206.71	26,910.03		Totals		
172,664.33	Corporate deficit	138,205.55	x 34,458.78		Corporate surplus		
535,961.01	Grand Total, Asset Side	528,412.26	x 7,548.75	535,961.01	Grand Total, Liability Side	528,412.26	x 7,548.75

x Red ink figures.

* Include in this item "cash" not only money, but also bank credit subject to demand, checks and sight drafts.

[fol. 328] Capital Stock and Funded Debt (page 4 of report): Unchanged.

Fixed Capital, December 31, 1925 (page 5 of report): Unchanged.

Operating Revenues and Expenses (Page 6 of Report)

Total operating revenues	$185,866.66
Operating expenses (exclusive of depreciation)	162,506.40

Depreciation of $11,451.48 and profit of $11,908.78 was charged to operating expenses, thereby balancing the accounts; also charged to operating expenses were: Interest, $3,329.98, and Repairs, $60,656.04.

[fol. 329] (Here follows comparative general balance sheet, side folios 330 and 331)

[fol. 330]

From the 1926 Report

Comparative General Balance Sheet (Page 3 of Report)

Line No.	Asset or debit side: Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Liability or credit side: Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)
	$ c		$ c	$ c	$ c		$ c	$
1	48,122.01	Cash*	10,200.62	x 38,921.45	.....	Taxes accrued and unpaid	.....	...
2	.....	Bills receivable	.....	.....	.....	Interest accrued on funded debt	.....	...
3	32.65	Accounts receivable	717.80	.....	.....	Interest accrued on unfunded debt	.....	...
4	.....	Other current assets	.....	.....	.....	Judgments unpaid	.....	...
5	48,154.72	Total Current Assets	10,918.42	x 37,236.30	.....	Receivers' certificates	.....	...
6	.....	Materials and supplies on hand	.....	.....	.....	Bills payable	164,790.00	164,
7	.....	.....	.....	.....	15,932.95	Accounts payable	38,482.24	22,
8	48,154.72	Total Floating Capital	10,918.42	x 37,236.30	.....	Salaries and wages unpaid	.....	...
9	.....	.....	.....	.....	.....	Dividends payable	.....	...
10	227,032.30	Fixed Capital (page 5)	494,167.08	267,134.78	71,358.37	Other unfunded debt*	71,358.37	...
11	.....	.....	.....	.....	87,291.32	Total Unfunded debt	274,630.61	187
12	.....	.....	.....	.....	.....	.....	.....	...
13	.....	.....	.....	.....	100,000.00	Funded Debt, page 4	100,000.00	...
14	.....	Investment	.....	.....	.....	.....	.....	...
15	76,718.14	Sinking funds, invested	79,435.14	2,717.00	187,291.32	Total Debt	374,630.61	187
[fol. 331]								
16	11,938.44	Sinking funds, uninvested	26,944.11	15,005.67	.....	Reserve for Accrued Depreciation	.....	...
17	.....	Special deposits	.....	.....	.....	Sinking fund reserves	.....	...
18	26,363.11	Prepayments	29,277.01	2,913.90	50,445.94	Other reserves Depreciation	73,058.23	22
19	.....	Suspense*	.....	.....	.....	.....	.....	...
20	.....	Deferred charges*	.....	.....	290,675.00	Common stock, page 4	300,000.00	9
21	.....	.....	.....	.....	.....	Preferred stock, page 4	.....	...
22	390,206.71	Totals	640,741.76	250,535.05	.....	Totals	747,688.84	...
23	x 138,205.55	Corporate deficit	x 106,947.08	x 31,258.47	.....	Corporate surplus	.....	...
24	528,412.26	Grand Total Asset Side	747,688.84	219,296.58	528,412.26	Grand Total, Liability	747,688.84	219

x Red ink figures.

* Include in this item "Cash" not only money, but also bank credit subject to demand, checks and sight drafts.

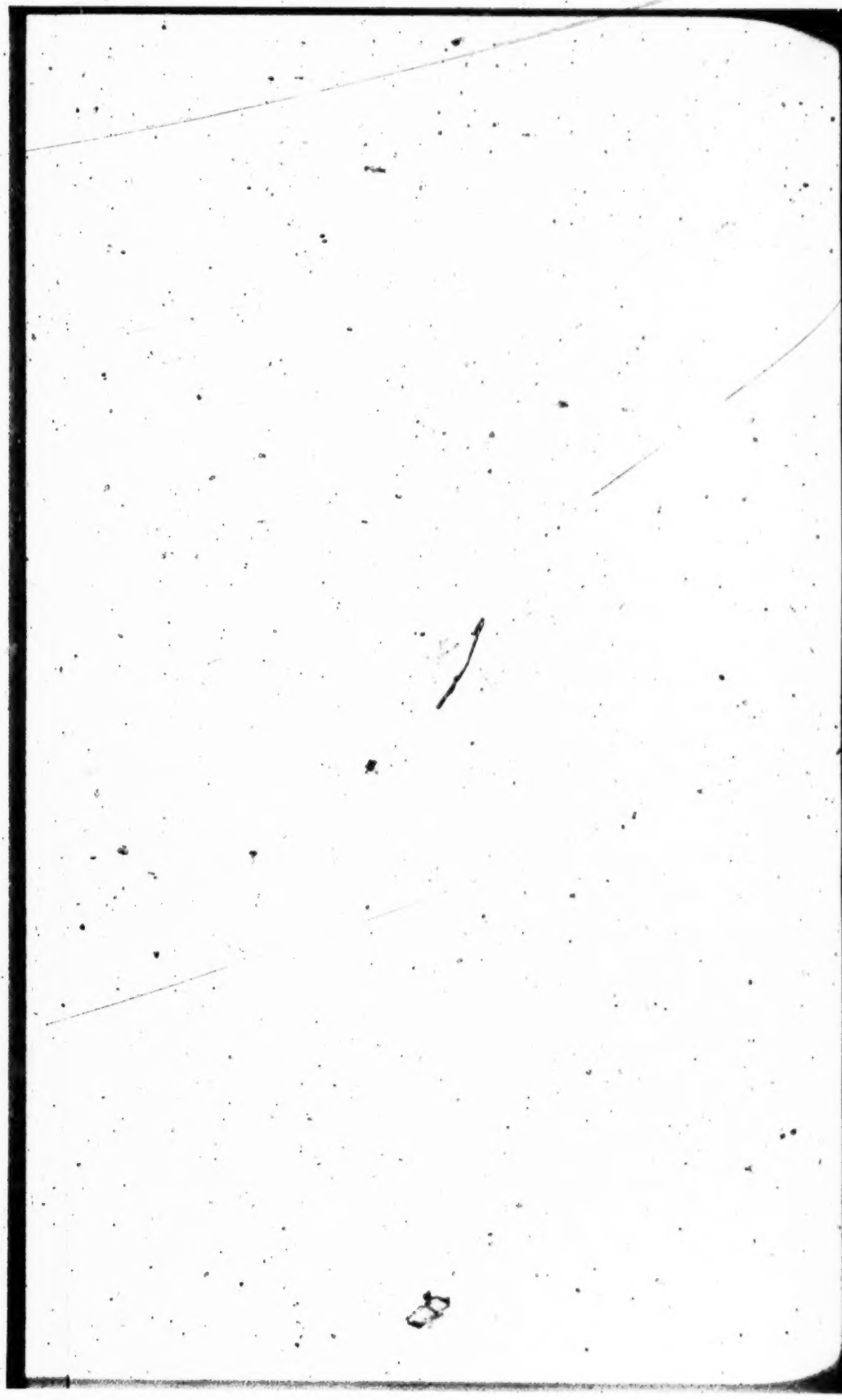
From the 1926 Report

Comparative General Balance Sheet (Page 3 of Report)

Asset or debit side					Liability or credit side		
Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)
$ c		$ c	$ c	$ c		$ c	$ c
48,122.01	Cash*	10,200.62	x 38,921.45		Taxes accrued and unpaid		
	Bills receivable				Interest accrued on funded debt		
32.65	Accounts receivable	717.80			Interest accrued on unfunded debt		
	Other current assets				Judgments unpaid		
48,154.72	Total Current Assets	10,918.42	x 37,236.30		Receivers' certificates		
	Materials and supplies on hand				Bills payable	164,790.00	164,790.00
				15,932.95	Accounts payable	38,482.24	22,549.29
48,154.72	Total Floating Capital	10,918.42	x 37,236.30		Salaries and wages unpaid		
					Dividends payable		
227,032.30	Fixed Capital (page 5)	494,167.08	267,134.78	71,358.37	Other unfunded debt*	71,358.37	
				87,291.32	Total Unfunded debt	274,630.61	187,339.29
				100,000.00	Funded Debt, page 4	100,000.00	
	Investment						
76,718.14	Sinking funds, invested	79,435.14	2,717.00	187,291.32	Total Debt	374,630.61	187,339.29
11,938.44	Sinking funds, uninvested	26,944.11	°15,005.67		Reserve for Accrued Depreciation		
	Special deposits				Sinking fund reserves		
26,363.11	Prepayments	29,277.01	2,913.90	50,445.94	Other reserves Depreciation	73,058.23	22,612.29
	Suspense*						
	Deferred charges*			290,675.00	Common stock, page 4	300,000.00	9,325.00
					Preferred stock, page 4		
390,206.71	Totals	640,741.76	250,535.05		Totals	747,688.84	
138,205.55	Corporate deficit	x 106,947.08	x 31,258.47		Corporate surplus		
528,412.26	Grand Total Asset Side	747,688.84	219,296.58	528,412.26	Grand Total, Liability	747,688.84	219,276.58

° Red ink figures.

* Include in this item "Cash" not only money, but also bank credit subject to demand, checks and sight drafts.



[fol. 332] Capital Stock and Funded Debt (page 4 of report): Unchanged.

Fixed Capital, December 31, 1926 (Page 5 of Report)

Wharf Property	$750.63
Marine Equipment	3,797.11
Electric Light Plant—Claiborne	737.82
Ferry steamers	487,511.36
Totals	492,797.02

Operating Revenues and Expenses (Page 6 of Report)

Total operating revenues	$209,799.62
Operating expenses	180,427.42

Depreciation, $22,612,29, and profit of $6,759.91 were charged to operating expenses, thereby ballancing the account.

The operating expenses include repairs	$27,050.41
Interest	6,357.27
Loss of vessel "Brennan"	27,063.94

[fol. 333] (Here follows comparative general balance sheet, inside folios 334 and 335)

[fol. 334]

From the 1927 Report

Comparative General Balance Sheet (Page 3 of Report)

	Asset or debit side					Liability or credit side				
Line No.	Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)		Balance at beginning of year	Item	Balance at close of year	Compa preced (increase decreas	
	$ c		$ c	$	c	$ c		$ c	$	
1	10,200.62	Cash*	663.96	x 9,536.66			Taxes accrued and unpaid			
2		Bills receivable					Interest accrued on funded debt			
3	717.80	Accounts receivable		x 717.80			Interest accrued on unfunded debt			
4		Other current assets					Judgments unpaid			
5	10,918.42	Total Current Assets	663.96	x 10,254.46			Receivers' certificates			
6		Materials and supplies on hand				164,790.00	Bills payable	24,970.00	x 139	
7						38,482.24	Accounts payable		x 38	
8	10,918.42	Total Floating Capital	663.96	x 10,254.46			Salaries and wages unpaid			
9							Dividends payable			
10	494,167.08	Fixed Capital (page 5)	437,851.94	x 56,315.14		71,358.37	Other unfunded debt*		x 71	
11						274,630.61	Total Unfunded Debt	24,970.00	x 249	
12										
13						100,000.00	Funded Debt, page 4	100,000.00		
14		Investments								
15	79,435.14	Sinking funds, invested	92,731.14	13,296.00		374,630.61	Total Debt	124,970.00		
[fol. 335]										
16	26,944.11	Sinking funds, uninvested		x 26,944.11		73,058.23	Reserve for Accrued Depreciation	93,442.33	20	
17		Special deposits					Sinking fund reserves			
18	29,277.01	Prepayments	25,513.11	x 3,764.10			Other reserves			
19		Suspense*								
20		Deferred charges*				300,000.00	Common stock, page 4	300,000.00		
21							Preferred stock, page 4			
22	640,741.76	Totals	556,760.15	x 83,981.61		747,688.84	Totals	518,412.83	x 229	
23	x106,947.08	Corporate deficit					Corporate surplus	38,347.82	38	
24	747,688.84	Grand Total, Asset Side	556,760.15	x 83,981.61		747,688.84	Grand Total, Liability Side	556,760.15	x 190	

x Red ink figures.

* Include in this item "Cash" not only money, but also bank credit subject to demand, check and sight drafts.

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From the 1927 Report

Comparative General Balance Sheet (Page 3 of Report)

Asset or debit side				Liability or credit side			
Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)
$ c		$ c	$ c	$ c		$ c	$ c
10,200.62	Cash*	663.96	x 9,536.66		Taxes accrued and unpaid		
	Bills receivable				Interest accrued on funded debt		
717.80	Accounts receivable		x 717.80		Interest accrued on unfunded debt		
	Other current assets				Judgments unpaid		
10,918.42	Total Current Assets	663.96	x 10,254.46		Receivers' certificates		
	Materials and supplies on hand			164,790.00	Bills payable	24,970.00	x 139,820.00
				38,482.24	Accounts payable		x 38,482.24
10,918.42	Total Floating Capital	663.96	x 10,254.46		Salaries and wages unpaid		
					Dividends payable		
494,167.08	Fixed Capital (page 5)	437,851.94	x 56,315.14	71,358.37	Other unfunded debt*		x 71,358.37
				274,630.61	Total Unfunded Debt	24,970.00	x 249,660.61
				100,000.00	Funded Debt, page 4	100,000.00	
	Investments						
79,435.14	Sinking funds, invested	92,731.14	13,296.00	374,630.61	Total Debt	124,970.00	
35]							
26,944.11	Sinking funds, uninvested		x 26,944.11	73,058.23	Reserve for Accrued Depreciation	93,442.33	20,384.10
	Special deposits				Sinking fund reserves		
29,277.01	Prepayments	25,513.11	x 3,764.10		Other reserves		
	Suspense*						
	Deferred charges*			300,000.00	Common stock, page 4	300,000.00	
					Preferred stock, page 4		
640,741.76	Totals	556,760.15	x 83,981.61	747,688.84	Totals	518,412.33	x 229,276.51
x106,947.08	Corporate deficit				Corporate surplus	38,347.82	38,347.82
747,688.84	Grand Total, Asset Side	556,760.15	x 83,981.61	747,688.84	Grand Total, Liability Side	556,760.15	x 190,928.69

Red ink figures.

Include in this item "Cash" not only money, but also bank credit subject to demand, checks and sight drafts.

[fol. 336] Capital Stocks and Funded Debt (page 4 of report): Unchanged.

Fixed Capital, December 31, 1927 (Page 5 of Report)

Pier and wharf property Annapolis and Claiborne, Md.	$750.63
Marine Equipment:	
Steamer "Harrington"	165,037.65
Motor Ship "Ritchie"	264,075.55
Steamer "Majestic"	55,298.05
(Amount credited during the year upon the steamer being sold.)	
Miscellaneous equipment on	
Steamer "Harrington"	1,248.45
Motor Ship "Ritchie"	3,059.23
Furniture and Fixtures on "Harrington"	2,942.61
Electric light plant—Claiborne	737.82
Marine equipment on "Majestic"	859.59
Furniture and fixtures on "Majestic"	157.50
(Last two items credited during the year.)	
Total balance at beginning of year	494,167.08
Credited during the year	56,315.14
Balance at close of year	437,851.94

Operating Revenues and Expenses (Page 6 of Report)

Total operating revenues	$277,604.20
Total operating expenses	209,642.49
Profit from operation	30,762.73
The above stated operating expenses include:	
Repairs	42,385.89
Miscellaneous operating expenses	32,024.41
Profit of $30,762.73 was charged to depreciation as follows:	
Steamer "Harrington" 5%	8,251.88
Motor Ship "Ritchie" 8⅓%	22,006.30
Marine Equipment 10%	430.77
Electric Light Plant—Claiborne 10%	73.78
Depreciation aggregating	30,762.73

Income Account and Corporate Surplus or Deficit Account for the Year (Page 7 of Report)

Operating revenues	$277,604.20
Operating expenses	209,642.49
Net operating revenue	67,961.71
Comparison with previous year is shown net operating income of	60,924.79
Corporate Surplus or Deficit Account:	
Debit	107,697.08
Credits	146,044.90
The credit entries include profit on "Majestic"	13,402.31

[fol. 337] (Here follows comparative general balance sheet, side folios 338 and 339)

[fol. 338]

From the 1928 Report

Comparative General Balance Sheet (Page 3 of Report)

	Asset or debit side					Liability or credit side			
Line No.	Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Balance at beginning of year	Item	Balance at close of year	Compari preceding (increases decreases
	$ c		$ c	$ c	$ c		$ c	$
1	.....	Cash*	40,859.52	40,859.52	.....	Taxes accrued and unpaid	15,000.00	15,0
2	.....	Bills receivable	.....	.....	.....	Interest accrued on funded debt	7,500.00	7,5
3	.....	Accounts receivable	1,976.67	1,976.67	.....	Interest accrued on unfunded debt	.....	.....
4	.....	Other current assets	.....	.....	.....	Judgments unpaid	.....	.....
5	.....	Total Current Assets	42,836.19	42,836.19	.....	Receivers' certificates	.....	.....
6	.....	Materials and supplies on hand	.....	.....	24,970.00	Bills payable	.....	24,9
7	.....	.....	.....	.....	7,005.00	Accounts payable	3,574.61	3,4
8	.....	Total Floating Capital	42,836.19	42,836.19	.....	Salaries and wages unpaid	.....	.....
9	.....	.....	.....	.....	.....	Dividends payable	.....	.....
10	437,851.94	Fixed Capital (page 5)	767,286.89	329,434.95	.....	Other unfunded debt x	.....	.....
11	.....	.....	.....	.....	31,975.00	Total Unfunded Debt	26,074.61	5,0
12								
13	.....	.....	.....	.....	.....	Funded Debt, page 4	250,000.00	250,0
14	.....	Investments	.....	.....	.....	.....	.....	.....
15	.....	Sinking funds, invested	.....	.....	.....	Total debt	250,000.00	250,0
[fol. 339]								
16	.....	Sinking funds, uninvested	.....	.....	92,691.70	Reserve for Accrued Depreciation	114,714.32	22,0
17	.....	Special deposits	16,500.00	16,500.00	.....	Sinking fund reserves	.....	.....
18	.....	Prepayments	.....	.....	.....	Other reserves	.....	.....
19	.....	Suspense x	.....	.....	.....	.....	.....	.....
20	2,009.26	Deferred charges x	9,910.94	7,901.68	315,194.50	Common stock, page 4	315,194.50	.....
21	.....	.....	.....	.....	.....	Preferred stock, page 4	.....	.....
22	439,861.20	Totals	836,534.02	396,672.82	439,861.20	Totals	705,983.43	266,1
23	.....	Corporate deficit	.....	.....	.....	Corporate surplus	130,550.59	130,5
24	439,861.20	Grand Total, Asset Side	836,534.02	396,672.82	439,861.20	Grand Total, Liability Side	836,534.02	396,6

x Does not agree with Depr. item page 6,—$516.46 charge to Reserve for Depr. on sale of Light Plant.

* Include in this item "Cash" not only money, but also bank credit subject to demand, checks and sight drafts.

From the 1928 Report

Comparative General Balance Sheet (Page 3 of Report)

Asset or debit side					Liability or credit side		
Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)
$ c		$ c	$ c	$ c		$ c	$ c
.....	Cash*	40,859.52	40,859.52	.....	Taxes accrued and unpaid	15,000.00	15,000.00
.....	Bills receivable	.....	.....	.....	Interest accrued on funded debt	7,500.00	7,500.00
.....	Accounts receivable	1,976.67	1,976.67	.....	Interest accrued on unfunded debt	.....	.....
.....	Other current assets	.....	.....	.....	Judgments unpaid	.....	.....
.....	Total Current Assets	42,836.19	42,836.19	.....	Receivers' certificates	.....	.....
.....	Materials and supplies on hand	.....	.....	24,970.00	Bills payable	.....	24,970.00
.....	.....	.....	.....	7,005.00	Accounts payable	3,574.61	3,430.39
.....	Total Floating Capital	42,836.19	42,836.19	.....	Salaries and wages unpaid	.....	.....
.....	.....	.....	.....	.....	Dividends payable	.....	.....
437,851.94	Fixed Capital (page 5)	767,286.89	329,434.95	.....	Other unfunded debt*	.....	.....
.....	.....	.....	.....	31,975.00	Total Unfunded Debt	26,074.61	5,900.39
.....	.....	.....	.....	.....	Funded Debt, page 4	250,000.00	250,000.00
.....	Investments	.....	.....	.....	.....	.....	.....
.....	Sinking funds, invested	.....	.....	.....	Total debt	250,000.00	250,000.00
.....	Sinking funds, uninvested	.....	.....	92,691.70	Reserve for Accrued Depreciation	114,714.32	22,022.62 x
.....	Special deposits	16,500.00	16,500.00	.....	Sinking fund reserves	.....	.....
.....	Prepayments	.....	.....	.....	Other reserves	.....	.....
.....	Suspense*	.....	.....	.....	.....	.....	.....
2,009.26	Deferred charges*	9,910.94	7,901.68	315,194.50	Common stock, page 4	315,194.50	.....
.....	.....	.....	.....	.....	Preferred stock, page 4	.....	.....
439,861.20	Totals	836,534.02	396,672.82	439,861.20	Totals	705,983.43	266,122.23
.....	Corporate deficit	.....	.....	.....	Corporate surplus	130,550.59	130,550.59
439,861.20	Grand Total, Asset Side	836,534.02	396,672.82	439,861.20	Grand Total, Liability Side	836,534.02	396,672.82

Does not agree with Depr. item page 6,—$516.46 charge to Reserve for Depr. on sale of Light Plant.
Include in this item "Cash" not only money, but also bank credit subject to demand, checks and sight drafts.

[fol. 340] Capital Stocks and Funded Debt (Page 4 of Report)

60,000 shares of no par value.
250,000 first mortgage bonds.

Fixed Capital, December 31, 1928 (Page 5 of Report)

Balance at close of year, $767,286.89.
The above amount includes $318,428.32, cost of motor ship "Dennis" under construction.

Operating Revenues and Expenses (Page 6 of Report)

Total operating revenues	$310,979.92
Operating expenses	140,643.22

The above operating expenses include depreciation of property, 22,539.08.
The depreciation is applied as follows:

Vessels, $429,113.20 at 5%	21,455.66
Marine Equipment, 8,000.92 at 10%	800.09
Essex Car, 850.00 at 33⅓%	283.33
Aggregating as above stated	22,539.08

$22,479.40 for Repairs was also included in operating expenses.

[fol. 341] (Here follows comparative general balance sheet, side folios 342 and 343)

[fol. 342]

From the 1929 Report

Comparative General Balance Sheet (Page 3 of Report)

Line No.	Asset or debit side: Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Liability or credit side: Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)
	$ c		$ c	$ c	$ c		$ c	$
1	40,859.52	Cash*	49,453.39	8,593.87	15,000.00	Taxes accrued and unpaid	15,283.58	
2	.....	Bills receivable	.....	.....	7,500.00	Interest accrued on funded debt	6,600.00	
3	1,976.67	Accounts receivable	1,916.67	60.00 D	.....	Interest accrued on unfunded debt	.....	
4	.....	Other current assets	10.40	10.40	.....	Judgments unpaid	.....	
5	42,836.19	Total Current Assets	51,380.46	8,544.27	.....	Receivers' certificates	.....	
6	.....	Materials and supplies on hand	.....	.....	.....	Bills payable	.....	
7	.....	.....	.....	.....	3,574.61	Accounts payable	7,127	
8	42.836.19	Total Floating Capital	.....	.....	.....	Salaries and wages unpaid	.....	
9	.....	.....	.....	.....	.....	Dividends payable	.....	
10	767,286.89	Fixed Capital (page 5)	878,505.08	111,218.19	.....	Other unfunded debt*	.....	
11	.....	.....	.....	.....	26,074.61	Total Unfunded Debt	29,011.24	
12								
13	.....	.....	.....	.....	250,000.00	Funded Debt, page 4	220,000.00	
14	.....	Investments	.....	.....	.....	.....	.....	
15	.....	Sinking funds, invested	.....	.....	250,000.00	Total Debt	220,000.00	
[fol. 343]								
16	.....	Sinking funds, uninvested	.....	.....	114,714.32	Reserve for Accrued Depreciation	148,027.44	
17	16,500.00	Special deposits	19,500.00	3,000.00	.....	Sinking fund reserves	.....	
18	.....	Prepayments	.....	.....	.....	Other reserves	.....	
19	.....	Suspense*	.....	.....	.....	.....	.....	
20	9,910.94	Deferred charges*	6,231.74	3,679.20 D	315,194.50	Common stock, page 4	315,194.50	
21	.....	.....	.....	.....	.....	Preferred stock, page 4	.....	
22	836,534.02	Totals	955,617.28	119,083.26	705,983.43	Totals	712,233.18	
23	.....	Corporate deficit	.....	.....	130,550.59	Corporate surplus	243,384.10	
24	.....	Grand Total, Asset Side	.....	.....	836,534.02	Grand Total, Liability Side	955,617.28	

* Include in this item "Cash" not only money, but also bank credit subject to demand, checks and sight drafts.
D Deficit.

From the 1929 Report

Comparative General Balance Sheet (Page 3 of Report)

Asset or debit side					Liability or credit side		
Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)	Balance at beginning of year	Item	Balance at close of year	Comparison with preceding year (increases in black, decreases in red)
$ c		$ c	$ c	$ c		$ c	$ c
40,859.52	Cash*	49,453.39	8,593.87	15,000.00	Taxes accrued and unpaid	15,283.58	283.58
.....	Bills receivable	.....	.....	7,500.00	Interest accrued on funded debt	6,600.00	900.00 D
1,976.67	Accounts receivable	1,916.67	60.00 D	.....	Interest accrued on unfunded debt	.....	.....
.....	Other current assets	10.40	10.40	.....	Judgments unpaid	.....	.....
42,836.19	Total Current Assets	51,380.46	8,544.27	.....	Receivers' certificates	.....	.....
.....	Materials and supplies on hand	.....	.....	.....	Bills payable	.....	.....
.....	.....	.....	.....	3,574.61	Accounts payable	7,127.66	3,553.05
42,836.19	Total Floating Capital	.....	.....	.....	Salaries and wages unpaid	.....	.....
.....	.....	.....	.....	.....	Dividends payable	.....	.....
767,286.89	Fixed Capital (page 5)	878,505.08	111,218.19	.....	Other unfunded debt*	.....	.....
.....	.....	.....	.....	26,074.61	Total Unfunded Debt	29,011.24	2,936.63
.....	.....	.....	.....	250,000.00	Funded Debt, page 4	220,000.00	30,000.00 D
.....	Investments	.....	.....	.....	.....	.....	.....
.....	Sinking funds, invested	.....	.....	250,000.00	Total Debt	220,000.00	30,000.00 D
.....	Sinking funds, uninvested	.....	.....	114,714.32	Reserve for Accrued Depreciation	148,027.44	33,313.12
16,500.00	Special deposits	19,500.00	3,000.00	.....	Sinking fund reserves	.....	.....
.....	Prepayments	.....	.....	.....	Other reserves	.....	.....
.....	Suspense*	.....	.....	.....	.....	.....	.....
9,910.94	Deferred charges*	6,231.74	3,679.20 D	315,194.50	Common stock, page 4	315,194.50	.....
.....	.....	.....	.....	.....	Preferred stock, page 4	.....	.....
836,534.02	Totals	955,617.28	119,083.26	705,983.43	Totals	712,233.18	6,249.75
.....	Corporate deficit	.....	.....	130,550.59	Corporate surplus	243,384.10	112,833.51
.....	Grand Total, Asset Side	.....	.....	836,534.02	Grand Total, Liability Side	955,617.28	119,083.26

*Include in this item "Cash" not only money, but also bank credit subject to demand, checks and sight drafts.
*Deficit.

[fol. 344] Capital Stock and Funded Debt (Page 4 of Report)

Capital stock: No change.

Funded debt: First mortgage bonds outstanding $213,000 ($37,500 of former outstanding bond issue of $250,000 paid off and retired).

Fixed Capital, December 31, 1928 (Page 5 of Report)

Balance at close of year	$878,505.08
Pier and Wharf Property, Annapolis Ticket Office	750.63
Real Estate:	
Kent Island Farm No. 1	10,640.70
Kent Island Farm No. 2	21,500.00
Kent Island Terminal, Land and Engineering	18,235.32
Marine Equipment:	
Steamer "Harrington"	165,037.65
Steamer "Ritchie"	265,535.55
Steamer "Dennis"	383,756.56
which, together with other property, aggregates	878,505.08

Operating Expenses and Revenues (Page 6 of Report)

Total operating revenues	359,509.18
Operating expenses	174,518.60

Operating expenses include $33,313.12 for depreciation of property; also Repairs, $38,368.50.

Important Changes During the Year (Page 8 of Report)

Shows that new vessel "Dennis" under construction at end of preceding year, had been completed and put into service June 15, 1929.

Lands had been acquired on Kent Island.

$30,000 of first mortgage bonds had been redeemed January 1, 1929.

[fols. 345 & 346] Finance Docket No. 8013

Exhibit No. 13

Finance Docket No. 8013

Transcript, pp. 160, 162

Vessels Used in Annapolis-Claiborne Ferry Service

"Emerson C. Harrington"	1919-
"General Lincoln"	1921-1923
"Majestic"	1923-1926
"Albert C. Ritchie"	1926-
"John M. Dennis"	1929-

The "Ritchie" and "Dennis" are now used on regular schedules with the "Harrington" in reserve. The period covered includes operations by the present company, the Claiborne-Annapolis Ferry Company, and its predecessor, the Claiborne-Annapolis Ferry, Inc. The "General Lincoln" was disposed of on June 11, 1924, and the "Majestic", August 12, 1927. The "Albert C. Ritchie" went into service on July 17, 1926, and the "John M. Dennis", on June 15, 1929.

[fol. 347] [File endorsement omitted.]

Endorsed on cover: File No. 36,268. District of Columbia Supreme Court. Term No. 454. Claiborne-Annapolis Ferry Company, appellant, vs. The United States of America, Chesapeake Beach Railway Company and Interstate Commerce Commission. Filed October 12, 1931. File No. 36,268.

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CHARLES ELMORE

FILE COPY

IN THE

Supreme Court of the United States

No. 454, October Term, 1931.

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
Appellant,

vs.

INTERSTATE COMMERCE COMMISSION, ETC.,
Appellees.

JURISDICTIONAL STATEMENT.

PHILIP B. PERLMAN,
JESSE I. MILLER,
GEORGE E. EDELIN,
Attorneys for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

No. 454, October Term, 1931.

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
Appellant,

vs.

INTERSTATE COMMERCE COMMISSION, ETC.
Appellees.

JURISDICTIONAL STATEMENT.

Now comes appellant, by counsel, and submits the following jurisdictional statement pursuant to Rule 12 of this Court.

This is an appeal from the Supreme Court of the District of Columbia in which appellant seeks a review of the decree of a special three-judge Court dismissing appellant's bill in a suit by it to set aside and annul a certificate of public convenience and necessity issued by the appellee, Interstate Commerce Commission, to the appellee, Chesapeake Beach Railway Company.

(a) Jurisdiction is conferred on this Court by the Act of October 22, 1913, Chapt. 32; 38 Stat. 220; U. S. C. A. Tit. 28, Chapt. 2, Sec. 47.

(b) The decree to be reviewed was entered by the Supreme Court of the District of Columbia on June 17, 1931 (Trans. p. 65). Petition for appeal was presented to the Supreme Court of the District of Columbia on June 17, 1931 (Trans. p. 66), and the appeal was granted on June 17, 1931 (Trans. p. 67). On June 17, 1931, the Supreme Court of the District of Columbia enlarged the time for docketing the appeal in this Court to August 17, 1931 (Trans. pp. 74-5). On July 30, 1931, Mr. Justice Butler, a Justice of this Court, further enlarged the time for docketing the appeal to October 17, 1931. The appeal was docketed on October 12, 1931.

(c) This proceeding was instituted in the Supreme Court of the District of Columbia by appellant against the Interstate Commerce Commission, the United States of America and the Chesapeake Beach Railway Company, a common carrier, having its principal place of business and residence in the District of Columbia, to set aside and annul a certificate of public convenience and necessity issued by the Interstate Commerce Commission to the Chesapeake Beach Railway Company, pretending to authorize the said Chesapeake Beach Railway Company to establish and operate a ferry between two points entirely within the State of Maryland. Act of October 22, 1913, Chapt. 32; 38 Stat. 219; U. S. C. A. Tit. 28, Chapt. 2, Secs. 43 and 41(28). It was alleged in said proceeding by appellant that the aforesaid certificate of public convenience and necessity was void and that unless the same was set aside and annulled, appel-

lant would suffer great and irreparable legal damage.

A hearing was had before a special three-judge Court convened pursuant to the provisions of the Act of October 22, 1913, Chapt. 32; 38 Stat. 220; U. S. C. A. Tit. 28, Chapt. 2, Sec. 47, and thereafter said three-judge Court delivered an opinion and entered a decree dismissing appellant's bill upon the grounds and for the reasons set out in said opinion (Trans. pp. 58-64).

(d) Jurisdiction in this Court on direct appeal is specifically authorized by the Act of October 22, 1913, Chapt. 32; 38 Stat. 220; U. S. C. A. Tit. 28, Chapt. 2, Sec. 47.

Wherefore, it is respectfully prayed that jurisdiction on appeal be noted.

PHILIP B. PERLMAN,
JESSE I. MILLER,
GEORGE E. EDELIN,
Attorneys for Appellant.

FILE COPY

Office Supreme Court,
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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 454.

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
Appellant,

versus

UNITED STATES, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

PHILIP B. PERLMAN,
JESSE I. MILLER,
GEORGE E. EDELIN,
Attorneys for Appellant.

The Daily Record Co. Print, Baltimore

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V. The Railway Company has no authority, under its charter, to engage in a general ferry business 39

VI. That, unless the certificate is cancelled and set aside, appellant will suffer great legal damage 45

VII. That, where it appears that appellant will suffer great legal damage unless the void certificate is set aside, it is entitled to institute and maintain this action 46

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Chesapeake and Ohio R. R. Co. v. United States, et al., 283 U. S. 35; 75 L. ed. 824 51

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 454.

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
Appellant,

versus

UNITED STATES, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

This is an appeal from the final decree (R., p. 49) of a specially constituted three-judge court, dismissing appellant's bill in an action by it to set aside a certificate of public convenience and necessity issued by the Interstate Commerce Commission on August 1, 1930, to the Chesapeake Beach Railway Company.

The opinion of the lower court is reported in 59 W. L. R. 410 (Adv. Sheets, June 19, 1931, No. 25) (R., pp. 44-48). The report, certificate and order of the Interstate Commerce Commission (R., pp. 18-33) are reported in 166 I. C. C. 293.

JURISDICTION.

The decree of the court below was entered on June 17, 1931 (R., p. 49). Petition for appeal was presented to said court and allowed on the same day (R., pp. 49-50). The time for docketing the appeal in this Court was enlarged from time to time to October 17, 1931 (R., p. 54). The appeal was docketed on October 12, 1931.

Jurisdiction of this Court rests on the Urgent Deficiences Act of October 22, 1913, c. 32, 38 Stat. 220, U. S. C. A. Tit. 28, Sec. 47(a) and Sub-sec. 4, Sec. 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C. A. Tit. 28, Sec. 345).

QUESTIONS PRESENTED.

The Commission's certificate of public convenience and necessity of August 1, 1930, pretended to authorize the railway company to establish and operate a general ferry service across Chesapeake Bay between two points entirely within the State of Maryland.

The primary question presented is whether or not this certificate is void. Appellant contends that as authority to operate a general ferry, the certificate is void because it is beyond the power of the Interstate Commerce Commission and that it is also void because there was no evidence either before the Commission or court below to support the certificate as authority to extend the railroad line. The special court held that there was sufficient evidence to support the certificate, construing it to be limited to authority to extend the rail line by ferry.

A second question involves the right of appellant, an intervenor before the Interstate Commerce Commission,

to maintain this action. It is appellant's contention in this respect that, if the certificate of the Commission is illegal and void, appellant can maintain the action if it be shown that it will suffer great legal damage, unless the certificate be set aside.

Although this question was urged below by appellees, the special court refused to pass on it, because it dismissed appellant's bill on the merits.

STATUTES INVOLVED.

The following portions of the Interstate Commerce Act, as amended, are primarily involved:

> Sec. 1, Par. 18. "EXTENSION OR ABANDONMENT OF LINES; CERTIFICATE REQUIRED. No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."
>
> "Sec. 1, Par. 3. * * * The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad * * *."

STATEMENT.

PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

This proceeding originated in the Interstate Commerce Commission upon the filing by the appellee, Chesapeake Beach Railway Company, of an application under Paragraphs 18 to 21, inclusive, of Section 1 of the Interstate Commerce Act, as amended, "for a certificate that the present and future public convenience and necessity require and will require an extension of its line by establishing and operating a ferry for the transportation of passengers and property between Chesapeake Beach in Calvert County, Maryland, across Chesapeake Bay and a point on Trippe's Bay in Dorchester County, Maryland" (R., pp. 124 and 126).

Upon a showing by appellant that it had a vital financial interest in the proceeding, it was permitted to intervene before the Commission (R., p. 157).

Thereafter testimony was adduced before an Examiner and the following facts, later to be set out in greater detail, were found to exist:

That the appellee, Chesapeake Beach Railway Company, hereinafter referred to as the Railway Company, was and is a common carrier by rail of freight and passengers, its line extending from a point just within the District of Columbia to a summer resort and amusement park at Chesapeake Beach, Maryland, on the western shore of Chesapeake Bay, a distance of approximately twenty-nine miles (R., p. 18). The railway company was organized in March, 1896, at which time it acquired, through foreclosure proceedings, the property and franchises of the Washington and Chesapeake Beach Railway

Company, a corporation chartered by the State of Maryland in September, 1891, and which became insolvent before completing the construction of the said railway line. Since acquiring the property, the Railway Company has also become insolvent. It is now in default in the payment of principal and interest of $1,000,000.00 of first mortgage bonds which matured July 1, 1923 (R., pp. 18-19). Moreover, it does not appear that any interest on these obligations was ever paid. There are other liens and claims against the property of varying amounts (R., p. 19).

Prior to 1929, operating revenues each year showed a deficit of substantial amounts (R., p. 19). In the year 1929 an operating profit was shown for the first time in the amount of $7,439.59 and this only after maintenance charges had been reduced by over $20,000.00 (R., p. 19). In short, the Railway Company is hopelessly insolvent.

That the intervenor, Claiborne-Annapolis Ferry Company, hereinafter referred to as the Ferry Company, has, for a number of years, operated a ferry service for passengers and vehicles on Chesapeake Bay between the City of Annapolis on the western shore of Maryland and the village of Claiborne on the eastern shore of Maryland (R., p. 11). More recently it has inaugurated a similar ferry service between Annapolis and Kent Island, Maryland (R., p. 112). The history of Maryland ferry companies operating on Chesapeake Bay has been one of financial disaster (R., p. 113). In order to maintain such a service, the State of Maryland paid an annual subsidy to the Ferry Company (R., pp. 111, 114 and 116). After operating for a number of years at a loss, the Ferry Company's business, by reason of the improved facilities employed by it and the increasing traffic between the eastern and western shores of Chesapeake Bay, began to im-

prove and, in the two years just prior to the commencement of this proceeding, showed substantial profits (R., pp. 31, 121-22).

That the so-called Eastern Shore of Maryland is a part of what is known as the Del-Mar-Va peninsula (R., p. 20), being separated from the mainland by the waters of Chesapeake Bay and connected with it at the northern end of the Bay. In order to travel by motor from the eastern to the western shore, it is necessary to proceed north to the northern end of the peninsula where it connects with the mainland and then to return southward to the western shore (see Map, Exhibit 3, R., p. 144-B), unless the journey from shore to shore is made by ferry over the waters of Chesapeake Bay. At the present time the Claiborne-Annapolis ferry is the one most convenient for use in reaching a large part of the peninsula, although there are other ferries from Baltimore to Tolchester, and from Baltimore to Love Point, etc. (R., p. 113).

With the development of improved highways on the Del-Mar-Va peninsula, motor traffic to and from the Eastern Shore has increased materially. This traffic consists principally of persons travelling in passenger motor vehicles from one shore to another, of motorists from more distant points on the mainland to various resorts on the Eastern Shore, of motor trucks carrying the produce of the Eastern Shore to the markets at Washington and Baltimore and also motor vehicles transporting various commodities from those centers to the Eastern Shore (R., pp. 26-28).

About two years prior to the filing of the present application, a movement was begun by residents of Cambridge, Maryland, a city on the Eastern Shore approximately

47.5 miles south of Claiborne, Maryland, the eastern terminus of the intervenor's ferry, to establish a ferry to operate from a point on Trippe's Bay on the eastern shore to Chesapeake Beach on the western shore of Maryland. It was believed by the advocates of this new ferry that it would add greatly to the convenience and increase the volume of traffic of persons travelling by motor vehicles between points on the Eastern Shore south of Cambridge and points on the Western Shore and beyond. Due, however, to the lack of necessary financial support, the project and the corporation organized to carry it into effect, were abandoned by its original proponents (R., p. 29).

Subsequently, the promoters of the project interested the Railway Company in it and the latter thereupon filed the present application with the Commission for a certificate permitting an "extension of its line" by ferry between the points mentioned (R., p. 29), at the same time seeking authority to sell $1,275,000.00 of new securities for that purpose (R., p. 20).

That for passenger motor vehicles and motor trucks travelling between the Western Shore and Eastern Shore of Maryland south of Cambridge it was shown that the inauguration of such a new ferry service might be a matter of convenience. It was nowhere shown, as will later be set out in greater detail, that the operation of such a ferry in connection with the rail line of the Chesapeake Beach Railway Company, that is as an "extension of its line," was or would be necessary or convenient to anyone. In other words, the only "public necessity or convenience," if any, to be served by the establishment of the proposed ferry was for motorists travelling from one shore to the other in passenger cars or trucks, under

their own power and whose transportation had not the remotest connection with the rail line of the applicant company.

Upon the foregoing facts the Examiner found that the public convenience and necessity required, or would require, the establishment of the proposed ferry and recommended the issuance by the Commission of a certificate to that effect.

Thereupon, the Ferry Company filed exceptions to the Examiner's report in which it was contended, among other things, that the Commission, upon the above showing, was not authorized by law to issue a certificate of public convenience and necessity for the establishment of a general ferry service between two points wholly within the State of Maryland, where the only public necessity or convenience, if any, involved was wholly unconnected with the operation of said ferry as an extension of the applicant's rail line.

Thereafter the matter was submitted to the Commission on the Examiner's report and intervenor's exceptions thereto and on August 1, 1930, the Commission made its report and order here in controversy (R., pp. 18-33).

The Commission found:

> "Upon the facts presented, we find that the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company of a ferry service across Chesapeake Bay, in Calvert and Dorchester Counties, Maryland, as set forth in the application" (R., p. 32).

It thereupon, on the same day, issued its certificate of public convenience and necessity (R., p. 32) authorizing the establishment and operation of the ferry.

Thereafter, the Ferry Company filed its petition for a modification of the Commission's certificate (R., p. 169) upon the ground that the same did not make it clear whether the Chesapeake Beach Railway Company was authorized to establish a railway ferry, that is, a ferry to be "used by or in connection with" its railroad, or whether it was authorized to establish and operate both a railroad ferry and a general or vehicular ferry. This petition for modification was denied by the Commission on October 13, 1930 (R., p. 177).

Thereafter, on October 14, 1930, the Public Service Commission of Maryland, on behalf of the State of Maryland, addressed a letter to the Interstate Commerce Commission (R., p. 178) in which it stated that, whereas the State of Maryland had no objection to an order of the Commission authorizing the Railway Company to operate a ferry to be "used by or in connection with its railroad," i. e., as an extension of its railway line, nevertheless, it did, on behalf of the State of Maryland, object to any order authorizing the establishment of a general ferry to operate entirely within the State of Maryland and not operating as an extension of said railway line. No action upon this protest was taken by the Commission and the certificate of August 1, 1930, continued and still continues in effect.

PROCEEDINGS IN THE COURT BELOW.

Suit to enjoin, cancel and annul the Commission's certificate and order of August 1, 1930, was filed by the Ferry Company against the United States, the Interstate Commerce Commission and the Railway Company

in the Supreme Court of the District of Columbia on December 24, 1930. The petition (R., pp. 1-7) alleged the invalidity and illegality of the certificate and order of August 1, 1930, upon the following grounds, among others:

1. That the Commission's only authority to issue its certificate in the instant case was upon a showing that public convenience and necessity required or would require the establishment and operation of a ferry to be "used by or in connection with the railway line" of the Railway Company and that there was no evidence, or no substantial evidence, showing any such convenience or necessity to be served.

2. That a finding of public convenience and necessity for the establishment of a general or vehicular ferry to operate between two points wholly within the State of Maryland and having, in such use, no connection with the railway line of the Railway Company was insufficient to authorize the issuance of the certificate and order complained of.

3. That the order and certificate were, therefore, illegal and void for the foregoing reasons and that the same should be cancelled and set aside.

4. That unless the said order and certificate were cancelled and set aside, the Ferry Company would suffer great and irreparable legal damage.

Answers were filed by all defendants (R., pp. 7-12; 13-17; 34-38). Each answer separately set up the following defenses:

1. That the Supreme Court of the District of Columbia was not a District Court of the United States within the purview of the District Court Act (38 Stat. 220).

2. That the three-judge court must include at least one Circuit Judge and that a Judge of the Court of the Appeals of the District of Columbia was not such a judge within the language of the Act.

3. That appellant could not "institute" this suit under the language of the jurisdictional statutes involved.

4. That the evidence before the Commission was substantial and sufficient to support its findings and certificate.

A three-judge court, consisting of two Justices of the Supreme Court of the District of Columbia and a Justice of the Court of Appeals of the District of Columbia was thereupon convened (R., p. 43) and a hearing held before said court on May 18, 1931 (R., p. 43). At said hearing there were introduced in evidence all of the proceedings, including the testimony taken, before the interstate Commerce Commission.

Following the hearing, the special court rendered its opinion on June 6, 1931 (R., pp. 44-48). It held:

1. That the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia were, respectively, a District Court and a Circuit Court of Appeals within the meaning of the District Court Act.

2. It refused to pass upon the question of the right of appellant to maintain the action because it was of the opinion that the Commission's order was valid and should not be set aside.

3. It refused to determine whether or not the Commisson's certificate authorized the Railway Company to conduct a general ferry business separate and distinct from its railway business and further refused to deter-

mine whether said certificate, if such was its effect, was in that respect invalid.

4. It determined that the Commission's certificate granted to the Railway Company the privilege of extending its rail line by ferry to the Eastern Shore of Maryland and that the evidence sufficiently supported the finding upon which it was based.

Thereupon, on June 17, 1931, the Court entered its final decree (R., p. 49) dismissing appellant's bill from which decree this appeal is now taken (R., pp. 49-50).

SPECIFICATIONS OF ERRORS TO BE URGED.

The following errors of the lower court are urged herein (R., pp. 51-52):

1. In finding that there was substantial evidence to support the Commission's certificate.
2. In not finding that the certificate was beyond the Commission's power to issue.
3. In not holding said certificate to be null and void because there was no evidence or substantial evidence to support it.
4. In not finding that the railroad has no authority under its charter to operate the service authorized by the certificate.
5. In not finding that appellant could maintain this action.
6. In dismissing appellant's bill.

SUMMARY OF ARGUMENT.

Appellant's general position on this appeal is as follows:

That the Commission was without authority to issue its certificate in the instant case unless it appeared that there was a public need for the establishment and operation of a ferry to be "used by or operated in connection with" the railway company's existing railway line, that is, as an extension of its line. That the only public need, if any, for a ferry disclosed by the record was for a general or vehicular ferry having, as such, no use by or operation in connection with the Railway Company's line. That the record contains no evidence whatsoever that public convenience or necessity require or will require the extension of the Railway Company's line by ferry and that a showing of public necessity for a general ferry was insufficient to support the Commission's certificate.

It is appellant's further position that, the certificate being void and it being about to suffer great legal damage unless the same be set aside, it is entitled to maintain this action.

The argument in support of the foregoing general position may now be briefly stated and later hereinafter elaborated in the following order:

1. The certificate of August 1, 1930, could be lawfully issued only upon a showing that public convenience and necessity required or would require the establishment and operation of a ferry as an extension of the rail line, that is, a ferry to be "used by or operated in connection with" said rail line.

2. That, unless a showing of such convenience and necessity were made, the existence of a public need for a general ferry was not sufficient to authorize the certificate.

3. There was no substantial evidence and, in fact, no evidence whatsoever, showing any necessity for the establishment and operation of a railroad ferry.

4. Where there is no evidence or no substantial evidence to support a necessary finding, the certificate based on such a finding is void.

5. The railroad has no authority, under its charter, to engage in a general ferry business.

6. That unless the certificate is cancelled and set aside, appellant will suffer great legal damage.

7. That, where it appears that appellant will suffer great legal damage unless the void certificate is set aside, it is entitled to institute and maintain an action to set the same aside.

ARGUMENT.

I.

THE CERTIFICATE COULD BE LAWFULLY ISSUED ONLY UPON A SHOWING THAT PUBLIC CONVENIENCE AND NECESSITY REQUIRED OR WOULD REQUIRE THE ESTABLISHMENT AND OPERATION OF THE FERRY AS A RAILROAD FERRY OR EXTENSION OF THE RAILWAY LINE, THAT IS, A FERRY TO BE "USED BY OR OPERATED IN CONNECTION WITH" THE RAIL LINE.

Section 1, Paragraph 18, of the Transportation Act, provides, in part, that

> "No carrier * * * shall undertake the extension of its line of railroad, * * * unless and until there shall first have been obtained from the Commission

> a certificate that the present or future public convenience and necessity require, or will require the construction, or operation, or construction and operation, of such * * * extended line of railroad."

Section 1, Paragraph 3, provides, so far as is here material, that

> "The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters and ferries used by or operated in connection with any railroad. * * *"

> "Public convenience or necessity, as used in the quoted statute, has been defined to mean a 'strong or urgent public need'." *Application of Utah Terminal Ry.*, 72 I. C. C. 89, 92.

Restating Paragraph 18 in the light of the definitions prescribed above, Paragraph 18 provides, in substance, that

> No carrier * * * shall undertake the extension of its line by a ferry unless and until there shall first have been obtained from the Commission a certificate that there is an urgent public need for the construction or operation, or construction and operation, of a ferry to be used by or operated in connection with said railroad.

This is the only provision of law under which the Commission was authorized, if at all, to issue the certificate here in controversy.

It will be necessary, initially, to consider briefly the rather obvious significance of the phrase "ferry used by or operated in connection with" a railroad.

> " 'A ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation of passengers or of travellers with their teams and vehicles and

other property as they may carry or have them' * * *. It, * * * growing out of public necessity and the public interest in its operation, is subject to local control." *St. Clair Co. v. Interstate Transfer Company*, 192 U. S. 454, 466-467.

A ferry, therefore, broadly speaking, is a part of the public highway, spanning a gap of water and is subject generally to local control.

The case just cited was an action by a County in the State of Illinois to recover certain statutory penalties alleged to have been incurred by the appellee in operating a ferry for transporting its railroad cars over the Mississippi River from St. Clair County, Illinois, to a point on the Missouri shore, without first having obtained from the County a license prescribed by statute for operating a ferry.

The Court held that, whereas, a general ferry for the transportation of persons and vehicles was a part of the local highway system and subject to local regulation and control, nevertheless, where a ferry was used solely for the transportation of railroad cars in bridging the river and thus in carrying on an interstate journey, any effort to tax such a ferry was a prohibited burden on interstate commerce.

Said this Court, quoting from *Mayor of New York v. New England Transfer Co.*, 14 Blach. 159, 167:

> "The reasoning which denies that a railroad bridge is an interference with an exclusive right theretofore granted to build an ordinary bridge, applies with almost equal force to the question, whether a ferry franchise is interfered with by a ferry which is designed for the transportation of railroad cars only. The boat of the defendants is provided with

two railroad tracks, which prevent the entrance or egress of ordinary vehicles, and also of foot passengers, except as they are transported in cars which run upon the railroad tracks. The boat is exclusively used for the transportation of railroad cars, in connection only with the arrival of trains. It is impossible to transport ordinary vehicles upon the boat, it is impracticable to transport foot passengers, except as they are conveyed to the boat in cars. The whole arrangement of boat and docks is for the ingress and egress of railroad cars, and not for the accommodation of anything else. The ferry is a part of a continuous through railroad line from places north and east of the city of New York, to places south and southwest of that city, and the trips of the boat are dependent upon the arrival of through railroad trains.

"Such a ferry is unlike an ordinary ferry for the transportation across a river of persons, animals, and freight, at intervals more or less regular, for fare or toll." (p. 468).

In *Golden Gate Ferry Company v. Railroad Commission*, 204 Cal. 305, it appeared that the Southern Pacific Railroad had been operating ferries across San Francisco Bay in connection with its railroad lines. It changed the style of its boats so as to fit them for carrying vehicular traffic, and undertook to engage in a general ferry business without first obtaining a certificate from the State Railroad Commission. The Railroad Commission found that the railroad was exempted by the California Public Utilities Act from the necessity of securing a certificate for the operation of either the ferry service in connection with its railroad or its vehicular ferry service. The Supreme Court of California, however, overruled the Commission, holding that the two services were distinct and that a general ferry service, not being a service incident to the operation of the railroad, the rail-

road had no authority to operate such a service without first obtaining from the State Railroad Commission a certificate to do so.

The Court said:

"An examination of the entire act under consideration evinces a determined purpose to give to the Railroad Commission power to regulate transportation on the inland waters of the state by granting or refusing certificates of public convenience and necessity, and a construction of the act, such as contended for by respondents, so as to exempt any person or corporation from applying for such certificate if he or it has been operating any type of vessel in any type of service before the act became operative, would leave with the Railroad Commission but a semblance of power, and to construe the act so as to exempt a corporation from securing a certificate to carry freight if it had previously carried freight over a different route, but one comparable in some of its features to the new route sought, would be to give an elasticity to the language and the action to be taken under it which would result in confusion and litigation and impotency on the part of the Commission. The safe, definite rule, and the one supported by the reason and purpose of the Public Utilities Act, would seem to us to be to construe the language, 'operating vessels in good faith,' to mean operating them in good faith in the essential and inherent features of the service sought to be continued after the effective date of the act. It seems apparent from the admitted facts that the Southern Pacific Company was not operating such a service at the date mentioned. A different type of vessel is to be used by the Southern Pacific Company from that used at the date of the Act; a different route is to be taken, and a different class of service rendered. * * *

"* * * At the time of the tariff amendment the Southern Pacific Company was engaged in the operation of vessels between Alameda pier and the Ferry

Building in San Francisco for the transportation only of passengers transported over its railroad. It had no tariff on file for the transportation of any freight of any kind whatever. *The operation of a vehicular ferry has no connection with the operation of a railroad service. It is in no way an adjunct of the railroad operation. A vehicular service could just as well be rendered by a corporation which had no rights whatever to operate a railroad.* The Southern Pacific Company, in another action, successfully maintained this contention before this court. (Southern Pacific Company v. Richardson, 181 Cal. 280; 184 Pac. 3)." (Italics ours.)

In the same case, a separate opinion was delivered by Preston, Judge, who, concurring in the result reached by the Court, said in part:

"If it be borne in mind that the Southern Pacific Company is seeking to engraft upon its railroad service, controlled by a foreign charter and over which the Railroad Commission has but limited control, a service that can be lawfully exercised only under local franchise grants, the intention of the legislature is easily discerned. The general terms employed in the statute must give way for the operation of the legislative intent (People v. Ventura Refining Company, *ante*, p. 286 ((268 Pac. 347))). *A local ferry operation is in no proper sense a railway operation as it may and usually does exist independent of it.* The carriage by water to bridge the gap between the interrupted termini is but an incident to the railway transportation, a projection of its road over intervening waters. Such ferriage is merged into the railway transportation and is no proper sense an entity or process resting upon its own independent foundation as is the case in commerce upon the inland waters, whether by ferry or other craft. This was the holding of this court in the case of Southern Pacific Company vs. Richardson, 181

Cal. 280 (184 Pac. 3), respecting the creek route ferry itself.

"Indeed, in Wheeler v. S. F. & A. R. Co., 31 Cal. 46, 64 (89 Am. Dec. 147), speaking of this identical subject, Justice Sawyer said: 'It is one thing to build and own a line of steamers to some foreign country, or some distant port, carrying on a wholly distinct and independent business entirely foreign to the objects of a railroad corporation, which might just as well, and a great deal better, be transacted by some other company organized for the purpose; and quite another, to own and control a steamboat for crossing rivers and bays which lay in the line of the road, and the use of which is convenient, proper and necessary to a successful accomplishment of the objects for which the road is built and operated.' This statement would be equally true if it had inserted therein the words 'port,' or 'or between local ports or points.' See, also, Wheeler v. S. F. & A. R. Co., *supra*. This distinction between these two classes of service has been recognized many times in other jurisdictions." (Italics ours.)

See also *Fitch v. New Haven, New London and Stonington Railway Company*, 30 Conn. 38; *The Maverick*, 16 Fed. Cas. (No. 9316) 1186; *Chesapeake Ferry Co. v. Hampton Roads Transportation Co.*, 133 S. E. (Va.) 561.

Sufficient has been said above, it is believed, to make plain the distinction between a general ferry, which is a link in the local public highways, and a railroad ferry, which is merely a moving bridge to enable a railroad to begin, continue or complete a travel over its rails.

The present uses of a railroad ferry may be somewhat more diversified than was the case thirty years ago. They may now include (1) the lightering of a railroad's passenger and freight cars, either empty or loaded, across a body of water to resume a rail journey on the other

side, (2) similar lighterage from a rail terminus to a more convenient unloading point, or (3) assembly of freight and passengers from a point of departure to the rail head, the latter two illustrations being typical examples of a railroad ferry service such as that maintained at the Baltimore and Ohio Railroad's New York City terminal.

In all such cases, however, the ferry is employed as an integral part of a journey by rail and merely serves as a link in such rail journey.

In the light of what has been said, it seems entirely obvious that a ferry to be "used by or operated in connection with" a railroad has certain very definite and easily ascertained characteristics both to the lay and legal mind. It is a ferry serving as a moving bridge for a railroad to enable it to begin, continue or complete the rail transportation of its freight and passengers. Such a ferry will, for purposes of brevity, be hereinafter referred to as a "railroad ferry."

From the foregoing, it seems plain that the effect of Paragraph 18, Sec. 1, of the Transportation Act is that the Interstate Commerce Commission was authorized, in the case at bar, to issue its certificate if, *and only if*, there was shown to be "an urgent public need for the construction or operation or construction and operation of a railroad ferry."

II.

THAT UNLESS THERE WAS A SHOWING OF URGENT PUBLIC NEED FOR A RAILROAD FERRY, THE EXISTENCE OF A PUBLIC NEED FOR A GENERAL FERRY WAS NOT SUFFICIENT TO AUTHORIZE THE CERTIFICATE.

From what has been said above, it seems clear that the only statutory basis upon which the Commission was authorized, in the case at bar, to issue its certificate was

upon a showing that there was an urgent need for the establishment of a railroad ferry.

Testimony that a need existed for a general ferry, in the absence of any showing of a need for a railroad ferry, is clearly insufficient under the statute to authorize the issuance of the certificate for reasons already discussed.

It is submitted that the Congress has no power under the Constitution to provide for a certificate based upon a need for a general ferry operating entirely within a single state, but that question need not be argued at length because the Congress has not attempted to exercise any such power. The Interstate Commerce Commission of course can not arrogate such authority unto itself.

> "They (inspection laws) form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently they remain subject to state legislation."
>
> Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1.

And see:

St. Clair County v. Interstate Transfer Co., supra.

Port Richmond and Ferry Co. v. Hudson Co., 234 U. S. 317, 58 L. Ed. 1330.

Wilmington Transport Co. v. Cal. R. R. Com., 236 U. S. 151, 59 L. Ed. 508.

Larson v. South Dakota, 278 U. S. 429, 73 L. Ed. 441.

In the State of Maryland, authority over ferries within the State has been conferred by the legislature upon the Public Service Commission of Maryland, by the provisions of Chapter 180 of the Acts of the General Assembly of 1910.

Bay Bridge Ferry Corp. v. Queen Anne's County, 160 Md. 398.

Section 1, Par. 2,* of the Transportation Act provides that it shall not apply to the transportation of passengers and property wholly within one State. The Interstate Commerce Commission, in its reports, after reviewings the testimony bearing on the usefulness of a *general ferry,* noticed the contention of the appellant that the Commission was not authorized by law to issue a certificate of public convenience and necessity for the establishment of a general ferry service from point to point within a State. The Commission, however, decided that upon the facts disclosed in the record, "we are of the opinion that we have jurisdiction in premises." And so the Commission granted authority for the construction of two ferry boats designed to carry 95 motor vehicles, a service without any relationship to the railroad business. And thus did it waive aside the Constitution of the United States, and the express limitation of power contained in the Transportation Act. We submit that the order is void on its face as beyond the authority of the Commission.

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* Par. 2 provides:

"The provisions of this chapter shall also apply to such transportation of passengers and property * * * but shall not apply—

(a) To the transportation of passengers and property, or to the receiving, delivery, storage, or handling of property, wholly within one State * * *."

This provision is, of course, merely a legislative recognition of the lack of constitutional power in the Congress to regulate intrastate commerce.

III.

THERE WAS NO EVIDENCE SHOWING ANY NEED FOR A RAILROAD FERRY.

From what has already been said, it is apparent that the certificate was without legal support unless there was a showing of a "strong and urgent need" for a railroad ferry.

It is, therefore, necessary to consider the evidence before the Commission and the court below on this point.

The Railroad's entire case before the Commission was built around existence of a need for a general ferry. The testimony was directed to a showing that motor traffic to and from the Eastern Shore by passenger vehicles and trucks was increasing rapidly; that the facilities of the Claiborne-Annapolis Ferry were at times inconvenient for a portion of this traffic originating at or bound for points south of Claiborne; that, upon estimates submitted of anticipated revenue from motor vehicles and passengers therein (R., pp. 23-25, and Ex. 7, p. 147), the proposed ferry would be able to earn substantial profits in furnishing an additional general ferry service. It will not be necessary to go into any elaborate discussion of the evidence touching on the need for a general ferry because this need may, for present purposes, be assumed.

Suffice it to quote from the Commission's report that the primary purpose of the new ferry was to

> "Evolve a system of transportation for expeditious handling of motor vehicles and persons travelling by motor vehicles in new routes shorter than now available between points on the lower Eastern Shore and points on the mainland" (R., p. 22).

The Commission's report then states that the traffic expected to use the proposed ferry may be grouped, by classes, as follows (R., p. 22):

"1. Private automobiles and motor busses transporting (a) tourist visitors and residents of the National Capital to and from Ocean City and other points on the Eastern Shore, (b) Eastern Shore patrons of an amusement park being developed at Chesapeake Beach by the Chesapeake Beach Hotel Company, and (c) persons traveling from one shore of the bay to the other in ordinary commercial and social communications.

"2. Motor trucks transporting fresh vegetables and fruits and seafood products from points of origin on the Eastern Shore to markets at Washington, and possibly Baltimore.

"3. Motor trucks used by west-shore jobbers in distributing various commodities to dealers on the Eastern Shore.

"4. Persons, in addition to the drivers, occupying passenger vehicles listed above, *persons traveling on through tickets between Chesapeake Junction and a station proposed to be established on the Eastern Shore at or near Hudson,* and west-shore visitors to the amusement park who may be attracted by a voyage on the waters of the bay.

"5. *Package freight moving from points in C. F. A.* or trunk-line territory to the station at Hudson."

It will be noted that, of the various classes of traffic intended to be served by the proposed ferry, all save two, presently to be discussed, consist of motor vehicles (together with persons therein) moving entirely independent of any rail line, traveling under their own power

over land and employing the ferry only as the means of continuing a motor journey interrupted by water. Only two classes of the traffic enumerated relate in any way to the proposed ferry in its "use by or operation in connection with" the railroad. These two classes are:

(1) Persons traveling on through tickets between Chesapeake Junction and a station proposed to be established on the Eastern Shore at or near Hudson, and

(2) Package freight moving from points in C. F. A. or trunk-line territory to the station at Hudson.

As to the need of a railroad ferry for these two types of traffic the Commission's report contained the following and *only* the following statements:

> "No estimate has been furnished as to package freight. The applicant expects the operation of the ferry would tend to increase the traffic over its railroad."

The remainder of its rather lengthy report is devoted to a discussion of the uses and necessity for a *general ferry.*

Bearing in mind, therefore, that the certificate is without legal basis unless there was evidence showing an urgent public need for a ferry to be used either (a) by through passengers between Chesapeake Junction and Hudson, or (b) for through package freight handled over the railway company's rail line, it is now proposed to examine in detail the evidence on these two points.

(a) *Through passenger traffic from Chesapeake Junction to Hudson.*

There is now set out *all* of the evidence bearing on the use or necessity for a railroad ferry in connection with the transportation of passengers between Chesapeake Junction, D. C., and Hudson.

From the testimony of the witness, Fox:

"Q. I want you to tell in your own way, Mr. Fox, the circumstances surrounding this application.

A. The proposed ferry is intended primarily for the transportation of passengers and motor vehicles and package freight" (R., p. 61).

* * * * * *

"Mr. Fox, will this proposed ferry be equipped to handle passengers from Chesapeake Junction to the Eastern Shore of Maryland?

A. Yes, sir. We propose to establish a station at the eastern terminus of the ferry, possibly the town of Hudson, there being such a village at the ferry landing or close to it. As a matter of fact right at the junction of the property at which the ferry will land, and the state highway, there is a town called Hudson and a post office. I believe the name of the post office is Thomas. It will be our purpose *to handle or to sell* tickets from Chesapeake Junction, D. C., to Hudson, Maryland, which will be the eastern terminus of our ferry.

Q. Those will be through passenger tickets?

A. Yes, sir.

Q. Operating over your line to Chesapeake Beach and the ferry line beyond?

A. Yes, sir.

Q. Do you now hold yourselves out in your tariffs to carry passengers from Chesapeake Junction, D. C., to Chesapeake Beach, Maryland?

A. Yes, sir. Our regular trains are scheduled to and from Chesapeake Junction to Chesapeake Beach,

the eastern terminus of the railroad. This ferry will be equipped to transport loaded passenger busses across the Bay. *If a passenger bus route were to be established from Washington, D. C., to Ocean City, Maryland, this ferry would be capable of handling that bus across the Bay, all sorts of vehicular traffic*" (R., pp. 67-68). (Italics ours.)

* * * * * *

"Q. Mr. Fox, this sub-exhibit No. 11 indicates increases from year to year and increases over the amounts shown in Exhibit No. 6 in freight and passenger revenues. Is that based, in part, on the assumption of increased business to be derived from the operation of the ferry?

A. I think I stated that the net earnings for 1929 of $7,439.59 were extended at the same ratio in 1931.

Q. What I intended to develop was whether you expected increased traffic on the railroad as the result of the operation of the ferry?

A. Yes, we do.

Q. In other words, you will not only handle vehicular traffic but you will handle passenger traffic from Washington, D. C.?

A. Yes. The increase to the railroad will come from passenger traffic using the ferry and the railroad" (R., pp. 69-70).

The foregoing constitutes every word of evidence in the record in support of a need for a railroad ferry in carrying through passenger traffic. There is not a word of testimony to show the class of travelers who need or would even use this through line of rail and ferry travel, no intimation of the number of such passengers who might be expecfed to employ it or any other fact showing the slightest "public necessity or convenience" to be served. The substance of the testimony is only that the

Railway would "handle or sell" through passenger tickets to any person who might offer to buy one. This so-called through passenger traffic is obviously merely a passing thought in the record because "the proposed ferry is intended primarily for the transportation of passenger and motor vehicles and package freight."

It is simply inconceivable that any reasonable person could say, upon this showing, that there was a "strong and urgent need" for a ferry to accommodate persons desiring to travel from Chesapeake Junction to Hudson over the company's rail line.

But if this alleged affirmative showing of necessity or convenience falls short of substance, the other facts in the record bearing on the same matter make the claim utterly ridiculous.

The record shows, in the first place, that for the last five years prior to 1930 the railway's passenger traffic has been steadily declining, due principally to an increasing use of motor vehicles over newly improved roads (Commission's Report, R., p. 19). Chesapeake Junction referred to is the northern terminus of appellee's railway line and is located on the District of Columbia-Maryland line (Ex. 2, p. 144-a). The so-called station "Hudson" is to be situated near the village of Hudson, the post office of which is "Thomas, Maryland," located at the junction of the state highway and the property on which the ferry will land (R., pp. 67-68). It is not stated how far the actual landing point is located from the highway, the exact point of landing being described in the record only as "a point on Trippe's Bay" (See, however, Ex. 15, p. 156-a.)

With these facts in mind it will be interesting to visualize the through passenger traffic that would accrue to the railway company if the proposed ferry were established. A person in the City of Washington desirous of going to the Eastern Shore via the new ferry would find that he would first be compelled to proceed to the District line (which is five miles from the center of the city) by street car, bus, taxi or on foot. He would then disembark at Chesapeake Junction, board appellee's train and proceed thereon for twenty-nine miles to Chesapeake Beach. There he would leave the train and proceed a distance of 2,200 feet or slightly over four-tenths of a mile (R., p. 107, and Ex. 16, p. 156-b) over a wharf to the ferry slip in order to enter the ferry. He would then be transported across Chesapeake Bay and discharged at a "point on Trippe's Bay" on the Eastern Shore. Just what he would do thereafter is left to conjecture. A charitable inference would be that ultimately a bus line might be established to operate between this "point on Trippe's Bay" and some more hospitable location on the Eastern Shore. The record, however, fails to disclose the end of the traveler's journey.

It is difficult to conceive of any person voluntarily taking such a journey. Certainly it would be sufficiently onerous completely to rebut the suggestion that there is a "strong and urgent public need" for such a service. As a matter of fact, the record is quite plain that, if the proposed ferry is established, a bus line will operate from Washington to points on the Eastern Shore via the new ferry (R., p. 68), and no one would ever employ the alleged convenience of a through trip on the railway. Not a single witness testified that it would be convenient or necessary to take such a trip, and the Railroad made no tangible claims that it had or would have patrons for any such service.

It is, therefore, submitted that there is not a scintilla of evidence to show a public need for the proposed ferry in connection with through passenger traffic to the Eastern Shore, and that any such contention falls little short of ridiculous.

(b) *Package freight to Hudson.*

The following is *all* of the evidence bearing on the use or necessity for a railroad ferry in connection with the handling of package freight from points on the mainland to Hudson.

From the testimony of the witness, Fox:

"Q. Would this ferry be equipped to handle merchandise, package freight, from any destination in Official Territory to Maryland destinations?

A. It is our purpose to handle package freight on the ferry from any point in C. F. A. or Trunk-Line territory to Hudson Station, where we will have a freight station in connection with our mole" (R., p. 68).

* * * * * *

"Q. In other words, you will not only handle vehicular traffic but you will handle passenger traffic from Washington, D. C.?

A. Yes. The increase of the railroad will come from passenger traffic using the ferry and the railroad.

Q. And also freight traffic?

A. And package freight traffic" (R., p. 70).

* * * * * *

Redirect Examination:

"Mr. Ames: In response to the Examiner's questions in respect to the possibility of adducing evidence in reply to questions 18 and 19 of the ques-

tionnaire, we desire to state that it is not our plan at present to handle carload freight traffic. We deem those questions particularly applicable to carload business and for that reason in our reply to the questionnaire we have indicated that they are not applicable to our operation. We do expect, however, to handle some merchandise or package freight moving in interstate commerce.

Examiner Molster: Do you expect to show the sources of the probable movement of the package freight?

Mr. Ames: Anything that we might show in that respect, your Honor, would be the barest kind of a guess. I have in mind one particular kind of package freight which will very likely move from Washington, and that is ice cream. As to other possible sources of freight, as I say, it would be the barest kind of a guess because we do not propose to operate until 1931. We cannot very well solicit on that basis, but the world is open to us on package freight. You have wholesale houses in Baltimore and in Washington, jobbers, if you please, who move package freight in considerable quantities to the Eastern Shore of Maryland. We shall certainly endeavor to our utmost to get that business for this ferry or at least a fair share of it, but I do not know that I could introduce any witness that would testify positively on just what we expect to get.

Examiner Molster: I think, if you will pardon the interruption, there is something in the testimony or else in the return to the questionnaire concerning the probable movement of perishables and seed products to Washington.

The Witness (Mr. Fox): That was intended, if I may say, Mr. Examiner, in response to the truck traffic moving to and from those points.

Examiner Molster: Rather than traffic of the railroad?

Witness: Rather than traffic, carload freight.

Mr. Ames: We expect to put on a produce man from Washington here who will testify about the possibility of the service. We will probably have other people who can testify as to the freight possibilities as well as the passenger possibilities" (R., pp. 81-82).*

Recross-examination:

"Q. I understand, Mr. Fox, that you are making no special claim as to the source of merchandise that you expect to carry?

A. No. It is all proposed. We will have a freight station at our other terminal as we have at the western shore terminal and we expect to handle some package freight business.

Q. I understood either you or counsel to say that what you had particularly in mind was business from Washington to the Eastern Shore or vice versa.

Mr. Ames: I do not think any such statement as that was made.

Mr. Perlman: I think, Mr. Ames said—(Mr. Ames interposing) I said that was incidental" (R., pp. 85-86).

It seems necessary to comment only briefly upon this testimony. Most of it is not "testimony" at all, but merely contributions to the record by counsel (Mr. Ames). There is no showing whatsoever of any public need for a rail-ferry route for package freight and indeed the record is quite clear that shipments of this sort are handled by motor truck service. The only definite contention made is that "the world is open" to the Railway on this type of traffic and that it hopes to secure some of it.

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* No such witnesses were produced.

It will be interesting, therefore, to learn from the record just how much of the "world" is actually open to this carrier, operating, as it would, in competition with motor trucks. Appellant has, for many years, had available to the public a service identical with the proposed one. Its ferry terminal at Annapolis immediately adjoins and connects with the Annapolis terminal of the Washington, Baltimore and Annapolis Railroad Company (R., p. 120), which thus connects the ferry with both Baltimore and Washington, whereas the proposed ferry would have a rail connection only with Washington.

The gross freight revenues of the Claiborne-Annapolis Ferry Company for the eight years immediately preceding the commencement of this case before the Commission were, respectively, as follows (R., pp. 31, 185):

1922	$812.84
1923	112.59
1924	Nothing
1925	190.42
1926	318.79
1927	201.38
1928	Nothing
1929	Nothing

It must be apparent, therefore, that not only has the Railway no package freight business in view but that there is actually none for it to secure. To assert, upon this record, that there is a "strong and urgent public need" for a new ferry to handle through package freight seems absolutely preposterous.

Hence, it is submitted, there was no evidence to show any public need for a ferry for that purpose. On the contrary, the evidence shows *affirmatively* that there is no need at all.

* * * * * *

The railroad estimated that during the first year of ferry operation, the operating expenses of the ferry would be $103,567 (R., p. 25). It is interesting to note that this same estimate is made for the succeeding four years (R., p. 25), although during that time the operating revenues are supposed to increase by almost 50% (from $365,000 to $533,082) (R., p. 25). The railroad also estimated fixed charges of $129,000, and taxes and insurance of $15,000, making a grand total of expenses and charges for the first year of $247,567 (R., p. 25), excluding any allowance for depreciation, obsolescence or any contingencies, and also excluding any allowance for interest on $600,000 of second mortgage bonds.

If the order of the Interstate Commerce Commission is to be construed merely as authority to operate a railroad ferry, then where is the revenue to meet these expenses and charges to come from? The Commission accepted the railroad's estimates of these expenses and charges, but apparently the learned court below overlooked the fact that if the certificate is limited to authority to extend the railroad, there is no testimony to support such a certificate. The record fails to disclose a single estimate of ferry revenue, passenger or package freight, to be derived from the extension of the railroad service across the Bay; and it affirmatively appears that no revenue from that source sufficient to support the operation is probable or even possible.

The attention of this Court is directed to the fact that the witnesses promised by the railroad's attorney to testify "to the freight possibilities as well as the passenger possibilities," were never produced. The record, therefore, is silent as to the sources and character of the freight which the railroad pretends will be shipped by railroad and ferry, except as to the lone suggestion of

ice cream—not testified to, but interjected by the railroad's ingenious counsel. And, as pointed out, the record is silent as to the source and number of passengers expected to travel by railroad and ferry, from one end of the line to the other. It is interesting to note that, in giving estimates of ferry revenue, the railroad drops all pretense that these estimated receipts have any relationship to the railroad, and all the ferry estimates are based solely on anticipated revenue from the ferriage of automobiles and trucks, and passengers of such automobiles and trucks.

The witnesses called by the railroad to testify as to public convenience and necessity confined their statements to the desirability of a ferry service for motor vehicles and the passengers of the motor vehicles. No such witness mentioned the railroad, or the railroad facilities. No such witness testified that the ferry was needed by or in connection with the railroad or railroad business. See testimony of the witness Purnell (R., p. 87); Matthews (R., p. 89); Henry (R., p. 89); Gray (R., p. 90); Hearn (R., p. 91); Gignilliat (R., p. 92); Robbins (R., p. 97); Morris (R., p. 100); Smith (R., p. 100); Hyde (R., p. 101); Hayghe (R., p. 103).

In giving the proposed schedule of ferry operation, the railroad made no claim that the schedule had any relationship to the railroad operation (R., p. 65). The record is also silent as to whether it would ever be possible to make a continuous journey by rail and water. In this respect, therefore, the proposed service fails to meet the test applied in *St. Clair Co. v. Interstate Transfer Company, supra,* and *Mayor of New York v. New England Transfer Co., supra,* where it was found that the trips of the railroad ferry "are dependent upon the arrival of through railroad trains."

The evidence in the court below consisted of all of the proceedings, including the testimony taken, before the Interstate Commerce Commission. Upon such a record the lower court found that the "finding of facts * * * sufficiently shows present or future public convenience and necessity" and that "the finding on which the order is based is supported by substantial evidence, and does not exceed the Commission's statutory powers."

The Court, in so holding, must necessarily have determined either (1) that there was substantial evidence showing a public need for a railroad ferry, or (2) that evidence of necessity for a general ferry alone was sufficient to support the certificate.

If the Court's conclusion was that there was substantial or sufficient evidence to show any need for a railroad ferry, it is submitted, upon the foregoing, that there is no substantial showing of any need whatsoever for a railroad ferry.

If the Court's conclusion was that a showing of necessity for a general ferry was sufficient to support the certificate then also the Court was in error.

It is, therefore, submitted that the lower court erred in finding that the evidence supported the certificate.

IV.

WHERE THERE IS NO EVIDENCE OR NO SUBSTANTIAL EVIDENCE TO SUPPORT A NECESSARY FINDING, THE CERTIFICATE IS VOID.

It has been seen above that there was no evidence before the Commission or the court below to support the finding on which the certificate was based. In such a case the certificate is void and must be set aside.

Thus, in *Interstate Commerce Commission v. Louisville and Nashville Railroad Company*, 227 U. S. 88, 91, this Court said:

> "In the comparatively few cases in which such questions have arisen it has been distinctively recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (citing numerous authorities) or if the facts do not, as a matter of law, support the order made (citing authorities)."

In *Skinner and Eddy Corp. v. United States, et al.*, 63 L. ed. 772, 249 U. S. 557, the Court said in referring to an order of the Interstate Commerce Commission:

> "The finding (of the Commission) thereon would have been conclusive, *unless there was lack of substantial evidence.*" (Parenthesis and italics ours.)

In *B. and O., etc., et al. v. United States, et al.*, (Chicago Junction case) 264 U. S. 258, 68 L. ed. 667, this Court said:

> "The privilege for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

In *Tagg Brothers v. U. S., etc.*, 280 U. S. 420, 442, it was said:

> "It has been settled in cases arising under the Interstate Commerce Act that if an order rests upon an erroneous rule of law, Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42; *or is based upon a finding made without evidence*, Chicago Junc-

tion Case, 264 U. S. 258, 263; *or upon evidence which clearly does not support it,* Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 547; New England Divisions Case, 261 U. S. 184, 203; Colorado v. U. S., 271 U. S. 153, 166, *the order must be set aside.*" (Italics ours.)

The law upon this point is so clear that it is unnecessary to elaborate the argument. Indeed, the Court below held that:

> "If it is true that the Commission is without power to make the order, it would follow necessarily, we think, that this Court would have jurisdiction, at the suit of a *proper party,* to enjoin its enforcement."

But

> "The finding on which the order is based is supported by substantial evidence and does not exceed the Commission's statutory powers."

Whether or not appellant was a "proper party," the Court did not determine, as hereinbefore pointed out.

It is submitted, however, at this point, that, there being no evidence to support the finding upon which the certificate was based, the certificate was void and should be set aside.

V.

THE RAILROAD HAS NO AUTHORITY, UNDER THE PROVISIONS OF ITS CHARTER, TO ENGAGE IN A GENERAL FERRY BUSINESS.

The railroad's charter contains authority for the company to

> "run and employ steamboats or other vessels to connect said railroad or railroads with other points by water communication;" (R., pp. 48; 163).

It is on this grant of power that the company relies for authority to engage in a general ferry business. But, in construing such language, the courts have repeatedly held that where railroads are given power to use boats to connect the railroad with other points, such boats cannot be operated as general or unlimited ferries. And such has been the ruling, even where the language went beyond that used in the applicant's charter and specifically authorized the railroads to locate and construct the railroad lines over and across ferries.

In Connecticut a railroad was enjoined from using its ferry boats for purposes other than that of transporting passengers and freight of the railroad, the Court saying:

> "They (petitioner's counsel) insist that the respondents' charter nowhere contains a grant of a *general, unlimited* ferry; or such a franchise as justifies them in carrying passengers between the two places above named, except as the passage is connected with a further use of the railroad. It is certain that ferries, like all public franchises, are subject to the pleasure and control of the legislature. The legislature alone can create them, and it must therefore be conceded that the respondents have no right to a general ferry, unless such a ferry is granted to them in their charter. We see no such grant. They obtained none by virtue of the charter of the New London and Stonington Railroad Company; on the contrary, the 8th section of that charter expressly restricts the right of ferriage to what is necessary 'for carrying the passengers and freight of said railroad to and from the same.' When afterwards, in 1856, the rights, franchises and duties of the New London and Stonington Railroad Company became invested in these respondents, under a charter consolidating that company with the New Haven and New London Railroad Company, we should have been surprised to

find that the legislature had thereby converted what was a limited ferry under the grant to the New London and Stonington Railroad Company, into a general unlimited ferry for the consolidated company. The legislature might have done so, it is true, as it had the power, but we should not under the circumstances have expected it, and we may well be jealous of that construction of the consolidated charter which the respondents say gives them an enlarged or general ferry. We believe nothing of the kind was contemplated by the legislature; nor will we impute such intention to the persons who procured the passage of the act.

"But the language of the consolidated charter is too plain to admit of any serious difficulty or doubt in its construction. The 5th section of this charter when fairly considered, can be construed to mean nothing more than what is expressed in the earlier charter, for it declares that the ferry shall be 'a part of the railroad or route,' to connect the road on the east side of the harbor with that on the west side. If then it is a part of the new continuous railroad, it is not and cannot be a general or unlimited ferry. The two are absolutely inconsistent. If the ferry be a general one, it ought to be accessible at all times by all people, with such vehicles and freight as are carried over ordinary ferries for a fixed toll, besides being subject to a ferry commissioner, as other ferries, and not to cease or expire whenever the railroad itself ceases. Now nothing like this is the case with this ferry, which is a mere link or connection between the two railroads. And further, if a ferry granted like this in connection with a railroad is to be worth anything to the railroad company, it must be exclusively appropriated to the use of the company, and be wholly under their control—that is, it must be a railroad and nothing more; not a common highway or bridge over a river or harbor."

Fitch v. New Haven, supra.

And in a Federal case in Massachusetts it was held that charter authority to maintain a ferry for railroad purposes is not to be understood as authorizing a railroad to take toll for all travel, and for purposes in nowise connected with the railroad. The Court said:

> "It has been contended, that this ferry was, in truth, kept by the Eastern Railroad Company, and that they are authorized to maintain it by the first section of their charter. Its language is as follows: 'And said corporation is hereby authorized and empowered to locate, construct; and finally complete a railroad from the city of Boston to the boundary line between the commonwealth of Massachusetts and the state of New Hampshire; on or near the line next hereinafter described, beginning at or near the land or wharf of the Lewis Wharf Company; thence by steamboats, or other boats, over and across the ferry, to East Boston, so called; thence,' &c., locating the road to the boundary of the commonwealth. This is merely descriptive of the line of the road. It was to run from a point at or near Lewis' Wharf, over and across the ferry to East Boston. The ferry is mentioned only to designate the route over which the corporation were to pass by steamboats, or other boats, for the purposes of a railroad. It certainly is not to be understood that this railroad corporation was authorized to establish and maintain a ferry and take toll for all travel, and for purposes in nowise connected with their road. The route of the road passes over the Merrimack River, and across the site of a bridge. Could the corporation, there, establish a general toll bridge, independent of the railroad? But further, this charter was granted on the 14th day of April, 1836. The ferry had been established, and Sumner, White and Oliver appointed ferrymen, in 1832. The second section of the charter declares, that 'nothing herein contained shall be construed to confirm, interrupt or impair, the existing rights of any corporation, person or persons, owning or interested in any ferry already established or

licensed.' This removes all pretense for saying, that the pre-existing ferry was intended to be merged in the railroad. It is preserved distinct and independent, and in nowise to be interrupted or impaired.

"I am constrained, therefore, to say, that neither under the license to Sumner, White and Oliver, nor under the charter of the Eastern Railroad, do the claimants derive any legal right to maintain this ferry; and that in doing so they are contravening the express provisions of the statute."

The Maverick, supra.

In a Virginia case, it was pointed out that charter of a railroad company, giving the company the right to convey, *inter alia,* passengers and vehicles across the body of water known as Hampton Roads, did not authorize the operation of a general ferry. The Court said:

"While it is true that the bill of complaint alleges that the Norfolk, Willoughby Spit and Old Point Railroad Company was empowered 'to charge and collect reasonable tolls, rates, and charges for its services in that regard,' it is nowhere explicitly alleged that a schedule of rates or tolls was ever promulgated for the operation of the ferry, separate and apart from the operation of the railroad. Courts, in construing an act of the legislature, must gather the legislative intent from the act as a whole. Thus construing the act incorporating the Norfolk, Willoughby Spit & Old Point Railroad Company, we are of opinion that it was the intention of the legislature to confer upon the company the right only to convey and transport passengers, teams, vehicles, freight, and other things across Hampton Roads by means of boats in connection with its railroad business, and not separate and apart therefrom. In other words, the act under review is a charter of incorporation of a railway, and was never intended to confer upon the appellant the exclusive right to operate a ferry be-

tween Willoughby Spit, in the city of Norfolk, and the military reservation of the United States Government at Old Point.

"The first and second sections of the act, instead of endowing the company with dual franchises, to wit, a railroad and a ferry franchise, are descriptive merely of the route of the railroad.

"In 25 C. J., par. 3, p. 1052, it is said:

" 'An express power to establish a ferry to effectuate other powers granted, does not confer a right to establish a ferry independent of the exercise of such powers.'

"In Darnell v. State, 3 S. W. 365, 48 Ark. 321, it is held:

" 'A right conferred by charter to build a toll road and to establish a ferry as an incident to the road is not a right to establish and maintain a public ferry independent of the road.'

"See 2 Farnham on Water and Water Rights, p. 1228.

"There is nothing in the bill to indicate that the boats operated by the appellant ran at periods other than such periods as connected its boats with the cars of its lessor, the Virginia Railway and Power Company.

"A ferry, both in common and legal parlance, is but the continuation of a highway from one side of the water over which it passes to the other side, or but the substitute for the ordinary bridge, and is for the accommodation of the public generally. New York v. New England Transfer Company, 14 Blatchf. 159, Fed. Cas. No. 10,197 (C. C.). Had the ferry in question been operated for the benefit of the public in general instead of being operated as a substitute for a railroad bridge we are inclined to the view that this fact would have been set forth in the bill in clear and unmistakable language. With the exception of

the use of the word 'ferry' in section 2 of the Act of incorporation, it does not appear anywhere in the act. On the other hand, the act fairly bristles with reference to the powers and limitations of the railroad company."

Ches. Ferry Co. v. Hampton Roads Transp. Co., supra.

VI.

UNLESS THE CERTIFICATE IS SET ASIDE, APPELLANT WILL SUFFER GREAT AND IRREPARABLE DAMAGE.

It seems to be undisputed in the record that, if the proposed ferry is established, appellant will suffer great and perhaps irreparable legal damage. Because of this self-evident fact, it was permitted to intervene in the proceedings before the Interstate Commerce Commission.

The record shows that the history of ferry companies operating over Chesapeake Bay has been one of financial disaster. In order to maintain such a service, the State of Maryland agreed to pay an annual subsidy to appellant. After some years of unprofitable operation, appellant, in the years 1928 and 1929, was able to earn substantial profits. In 1928, its gross revenues were $310,979.92 (R., p. 199) and its net income $130,550.59 (R., p. 31). In 1929 its gross was $359,509.18 (R., p. 201) and its net $125,869.59 (R., p. 31).

The railroad's estimates of ferry revenue were based upon a traffic count of motor vehicles at Claiborne. The railroad assumed that 32 per cent. of the vehicles at Claiborne, a terminus of the appellant, would be diverted to the proposed service offered by the railroad (R., p. 23). If this estimate is sound, the appellant will be ruined. It was pointed out to the Commission, that the estimates of revenue presented by the Railroad were faulty, in that all the vehicles at Claiborne did not cross

the bay (R., p. 24), and that if the Railroad could get 32 per cent. of the appellant's business, it would ruin the appellant without obtaining enough to justify its own operation. The Commission admitted that this argument was "pertinent," but undertook to accept the Railroad's estimates anyhow, because the Railroad said the estimates "represent its best judgment in the matter" (R., p. 24).

According to the Railroad's testimony before the Commission, if it is permitted to establish its proposed competing ferry, that ferry will absorb gross revenues from the traffic now available to appellant in the amount of $365,000.00 for the first year and in increasing amounts for each succeeding year. If the railway company's actual ferry revenues be only one-half of its estimated ones, it is apparent that appellant will suffer an annual operating loss from and after the establishment of the proposed ferry and will soon go the way of all its predecessors. Moreover, the record is clear that not only will the proposed ferry bring about the financial collapse of appellant's company, but that both ferries will, in the process, be completely wrecked.

It is, therefore, submitted that, if the proposed ferry is established, appellant will suffer great and perhaps irretrievable damage.

VII.

IT APPEARING THAT THE CERTIFICATE IS VOID AND THAT UNLESS THE SAME BE SET ASIDE, APPELLANT WILL SUFFER GREAT AND IRREPARABLE LEGAL DAMAGE, APPELLANT IS ENTITLED TO INSTITUTE AND MAINTAIN THIS ACTION.

If it be determined, upon the foregoing situations, that the Commission's certificate is void and that, unless the same be set aside, appellant will suffer great legal dam-

age, then it appears to be certain that appellant has the right to institute and maintain this action.

Section 212 of the Judicial Code, (originally the Commerce Court Act, June 18, 1910, Chap. 309, 36 Stat. at L., 542, Comp. Stat., Sec. 1005) provides:

> "That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party."

While this provision seems clearly to authorize appellant to maintain the case at bar, appellees urged below two grounds upon which they contended that appellant could not maintain the action:

a. That the statute just quoted permitted appellant to *intervene* in a proceeding to set aside an order of the Commission, but that it did not authorize it to *institute* any such proceeding; and

b. That, even if appellant might *institute* such a proceeding, appellant was not a proper party to maintain the action because it did not have a sufficient legal interest in the subject matter.

(a) Upon the first proposition, a sufficient answer is the language of this Court in *Baltimore and Ohio Railroad Company, et al. vs. United States, et al.*, (Chicago Junction Case) 264 U. S. 258, 68 L. ed. 667, in which a similar contention was apparently made. There, this Court said:

> "The plaintiffs may challenge the order because they are parties to it. The Judicial Code, Section

212, (originally the Commerce Court Act (June 18, 1910, Chap. 309, 36 Stat. A. L. 542, Comp. Stat. Sec. 1005)) declares that any party to a proceeding before the Commission may, as of right, become a party to, 'any suit wherein is involved the validity of such order.' The section does not in terms provide that such party may *institute a suit* to challenge the order. But this is implied. For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order. Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest." (Italics ours.)

(b) Upon appellees' second contention, the lower court said:

> "If it is true that the Commission is without power to make the order, it would follow necessarily, we think, that this Court would have jurisdiction, *at the suit of a proper party,* to enjoin its enforcement, but we need not stop here to inquire whether the ferry company is such a party since we are of the opinion that the Commission had jurisdiction and that the finding on which the order is based is supported by substantial evidence, and does not exceed the Commission's statutory power." (Italics ours.)

Had the lower court found the certificate void, it is impossible, of course, to say what its decision may have been as to appellant's right to maintain this action. It would be strange indeed, however, if, upon a showing that the Commission had promulgated a void order and that its action, unless enjoined, would result in the destruction of appellant's property rights, no Court would have jurisdiction to grant relief. It must undoubtedly be true that some person under such circumstances could invoke the aid of the judicial branch of the government. The lower court held, as above set out, that such a suit could undoubtedly be maintained by a "proper party."

The question now to be determined is whether or not appellant is the "proper party" to maintain it. That it is, seems to be settled by clear and convincing authority. *Skinner and Eddy Corp. v. U. S., et al.*, 63 L. ed. 772, 249 U. S. 557; *Baltimore and Ohio, etc., et al. v. U. S., et al.*, (Chicago Junction case), 264 U. S. 258, 68 L. ed. 667; *Chesapeake and Ohio Ry. Co. v. U. S.*, 75 L. ed. 824, 283 U. S. 35; *Anchor Coal Co. v. U. S.*, 25 Fed. (2nd) 462, 478; *Cleveland, etc. Ry. Co. v. Jackson*, 22 Fed. (2nd) 509.

Skinner and Eddy Corp. v. United States was an action by a shipper to set aside an order of the Interstate Commerce Commission, increasing certain rates on steel from Pittsburgh to Seattle. The Transportation Act prohibited increasing such rates where the same had been once reduced, except upon proving the existence of certain economic conditions other than the elimination of water competition. It appears in this case that the statutory condition precedent to the issuance of the Commission's order had not been met and that the order was therefore void as having been issued in violation of the statute. The Court, in holding that appellant had the right to maintain this action, said:

> "The defendants contend that the district court did not have jurisdiction of the subject matter of this suit * * *. This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory the remedy must have been sought primarily by proceedings before the Commission (citing cases); and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law (citing cases). But plaintiff does not contend that 75 cents is an unreasonably high rate, or that it is discrim-

inatory, or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission."

In *B. & O. v. United States* it appeared that the New York Central Railway had secured an order from the Interstate Commerce Commission permitting it to acquire control of two switching roads in the Chicago terminal area. Defendants contended, as in the case at bar, that plaintiffs *did not have sufficient legal interest* to entitle them to maintain an original suit to set aside the Commission's order. It appeared that the order of the Commission was discriminatory and thus in violation of the Transportation Act. In sustaining appellant's right to maintain the suit, the Court said:

"Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs.

"Second, The defendants contend that the plaintiffs have not the legal interest necessary to entitle them to challenge the order. That they have, in fact, a vital interest is admitted. * * *"

"If * * * a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here."

"This loss is not the incident of more effective competition. * * * It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper."

C. & O. R. Co. v. United States. Although the basis of the complaint in this case was mere loss of a competitive advantage, and while it was apparently conceded that the order of the Commission was valid, nevertheless the court did not even consider the jurisdictional question in the case at bar.

The Anchor Coal Company case, as also the Chicago Junction case, supra, was heard by a three-judge court in a suit to set aside an order of the Interstate Commerce Commission. In sustaining complainant's right to maintain the action, the court said:

"Having reached the conclusion that in entering the order complained of the Commission exceeded its powers and proceeded upon erroneous principles of law, the question which presents itself is whether this court has power to grant relief. We think that it has. Suit is instituted by coal producers who are vitally affected by the rates. Some of them were residents of the Southern District of West Virginia, and were heard before the Commission in the proceeding in which the order complained of was entered, and, although not originally parties to the proceeding, they became parties by intervention and were heard as such. We think that the court has jurisdiction under U. S. C. Tit. 29, Secs. 46 and 47, (28 U. S. C. A., Secs. 46, 47). Chicago Junction case, 264 U. S. 258, 267, 44 S. Ct. 317, 68 L. Ed. 667. And, although we do not understand that question is

raised as to venue, but merely as to jurisdiction, we think that the venue is good under U. S. C. Tit. 28, Sec. 43 (28 U. S. C. A., Sec. 43). Skinner v. Eddy Corp. v. U. S., 249 U. S. 557, 39 S. Ct. 375, 63 L. Ed. 772."

The court's attention is invited to the fact that this case was reversed by the Supreme Court in a memorandum opinion, but upon the sole ground that the question presented to the court had then become moot. 279 U. S. 812, 73 L. Ed. 971.

See also:

Cleveland etc. Ry. v. Jackson, 22 Fed. (2d) 509.

It is submitted that the foregoing cases clearly support the proposition that where the order of the Interstate Commerce Commission is void and where the complainant has been allowed to intervene before the Commission because of financial interest, or where it can otherwise show a financial interest, complainant has a legal right to maintain such a suit as the one at bar.

See also:

Western Pacific California R. R. Co. v. Southern Pacific Co., (decided November 23, 1931), not yet reported.

Appellees maintain, however, that this is not true and in support of their contention that appellant cannot maintain this action relied below on the four cases which will now be analyzed.

(a) *Sprunt & Son v. U. S.*, 281 U. S. 249, 74 L. Ed. 832. In this case it appears that the Interstate Commerce Commission had adjusted certain rates on cotton for domestic and export shipments. Appellant, a shipper, who suf-

fered a competitive disadvantage by reason of such adjustment in rates, brought this suit to set aside the Commission's order. *No complaint was made that the order was invalid* for want of statutory authority in the Commission to make it, but the complaint was based solely upon the fact that the adjustment resulted in financial loss to complainant. The court, after stating that if the rates were unreasonable, appellant might complain to the Interstate Commerce Commission in an administrative proceeding, held that the action could not be maintained by appellant because it was "not subjected to, or threatened with, any legal wrong."

(b) *Pittsburgh & West Virginia Ry. Co. v. United States, et al.*, 281 U. S. 479, 74 L. Ed. 980. In this case it appears that the Wheeling & Lake Erie Railway, of which the Pittsburgh & West Virginia was a minority stockholder, had secured a certificate of public convenience to abandon its railway station in Cleveland terminal. The Pittsburgh claimed that if the order were permitted to stand the financial stability of the Wheeling would be jeopardized and that it in turn, as a stockholder, would suffer financial injury. No complaint was made that the Interstate Commerce Commission lacked statutory authority to issue the order complained against. In denying the Pittsburgh's right to maintain the action, the court said:

> "The claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder, is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order."

(c) *Pennsylvania Co. v. United States, et al.*, 40 Fed. (2d) 921. The Pennsylvania brought this suit to set

aside an order authorizing the extension of a competing line into territory in which the Pennsylvania had theretofore had a practical monopoly. The only basis for the suit, as pointed out by the court, was the loss of a competitive advantage. *No complaint was made that the order of the Commission lacked statutory authority* and the suit was therefore dismissed upon the ground that the Pennsylvania did not have sufficient legal interest to maintain it.

* * * * * *

It is readily apparent from the foregoing brief review of these three cases that in none of them was it contended that the order of the Interstate Commerce Commission complained of *was invalid or exceeded the authority conferred by statute upon the Commission.* In each case the action was based upon the single claim *that an order, the validity of which was not questioned,* would result in financial damage to complainant.

* * * * * *

(d) *Edward Hines Yellow Pine Trustees, et al., v. United States, et al.,* 263 U. S. 143, 68 L. Ed. 216. This case was one wherein plaintiffs, even assuming the order of the Commission to be void, (which was not decided) had not suffered, and were not threatened with any loss or injury whatever. On the contrary, their sole complaint was that the Commission's order removed from their competitors the burden of a penalty, the continuance of which would give plaintiffs a preferential status.

There is not the slightest conflict between the foregoing authorities relied upon respectively by appellant and appellees. The rule clearly deducible from all of them is plain and may be stated as follows:

(a) That, where the Commission's order is valid but will result in financial loss to the complainant, no action

can be maintained; (*Sprunt & Son v. U. S.; Pittsburgh & West Virginia Ry. Co. v. U. S.; Pennsylvania Co. v. U. S., supra*).

(b) That, where the order is void but no legal damage will result to complainant, no action can be maintained (*Hines, etc., v. U. S., supra*); but

(c) That, where the order is void and complainant will suffer financial loss therefrom, an action can be maintained. (*Skinner & Eddy Corp. v. U. S.; Baltimore & Ohio Ry. Co. v. U. S.; Chesapeake & Ohio Ry. Co. v. U. S.; Anchor Coal Co. v. U. S., supra*).

It is submitted that the certificate here involved was void; that, unless the same be set aside, the financial ruin of appellant will ensue and that, therefore, appellant can, as a matter of right, maintain this suit.

CONCLUSION.

From what has been said above, it must be apparent to this Court that the Railway Company, under the pretense of extending its line, is seeking to establish a general ferry between two points entirely within the State of Maryland and having no real connection or use whatsoever with its railway business.

The railroad proposes to build, for this pretended extension of its railroad line, two ferry vessels, at a cost of $350,000 each, a total of $700,000 (R., p. 20). These vessels are to be designed to carry 95 motor vehicles and 1,800 passengers (R., p. 20), although its passenger revenues have been decreasing year by year (R., p. 19), and, until it reduced its maintenance expenditures in 1929, it did not earn operating expenses from passenger and freight revenue combined. It cannot be seriously con-

tended, or contended at all, that vessels of such size are needed to extend the railroad line; or that the ferriage of motor vehicles and occupants of motor vehicles has any relationship to the railroad. With total revenues from passengers and freight in 1929 of $118,146 (R., p. 19), the railroad proposes to expend $1,085,442 for an "extension" of its line.

Having defaulted in interest and principal payments on its bonded indebtedness of $1,000,000, it now seeks to substitute a $600,000 second mortgage for its existing obligation, and to issue new first mortgage bonds for $750,000, a total indebtedness of $1,350,000, and then to issue $525,000 of equipment trust certificates, in order to engage in this ferry venture.

It is certain that, if denied authority to operate a general ferry, the railroad is not interested in making these expenditures, incurring these obligations and extending its line for its railroad business.

Its obvious purpose is to evade the jurisdiction of the Maryland Public Service Commission. The Interstate Commerce Commission, in turn, has seen fit, it is believed, to transcend not only the plain provision of Section 1, Par. 3, but also that of Section 1, Par. 2, of the Transportation Act.

In its report, on which the order complained of was based, the Commission referred to the alleged extension of the railroad only incidentally, and devoted practically all of its discussion to the convenience or need of a general ferry across Chesapeake Bay from Chesapeake Beach to Trippe's Bay.

Whether or not such a ferry is necessary for the convenience of the public is purely a matter for determina-

tion by the State of Maryland, through its agencies constituted for that purpose. The Interstate Commerce Commission has manifold duties to perform within its sphere and should, especially under existing conditions, be slow to encroach upon a jurisdiction denied it by the statute, if not by the Constitution as well.

It seems clear from record that, even assuming power in the Interstate Commerce Commission to usurp the functions of the Maryland Public Service Commission, the railroad failed to show the existence of an "urgent public need" for the establishment of a general ferry at the points designated in the application. Lacking anything but the assurance of patronage from those few especially advantaged, the railroad submits estimates which do not bear analysis, and which are admittedly nothing but guesses. For instance, the railroad finds from the State Roads Commission of Maryland an average of 780 vehicles each day at Claiborne, Maryland, the eastern terminal of the Claiborne-Annapolis Ferry Company. Because Claiborne is 15 miles from any other town, the railroad *assumes* that *all* of this traffic is ferry traffic.

The railroad further *assumes* that 32 per cent. of this traffic would originate at or be destined for points south of the Choptank River, and, after making these two assumptions, applicant estimates that, in the first year of operation it would carry an average of 250 motor vehicles per day, or 91,250 per year, across Chesapeake Bay.

The fact is, however, that *all* of the vehicles at Claiborne do not cross Chesapeake Bay, and not even a substantial part of them make the trip. The Claiborne-Annapolis Ferry Company offers facilities (three boats) to

carry to and from Claiborne across Chesapeake Bay 216,445 motor vehicles (R., p. 117), and yet in the year 1929 actually carried but 76,352 (R., p. 114) and p. 117), motor vehicles. This is at the rate of 209 motor vehicles per day. So of the average of 780 motor vehicles at Claiborne per day *only 209 of that number actually crossed Chesapeake Bay* (R., p. 117). The railroad forgets or ignores the fact that of the average of 780 motor vehicles per day at Claiborne, many are there simply to meet passengers on the ferry and others to bring passengers to the ferry. To assume that 250 of 780 will cross the Bay at Trippe's Bay, is to assume that *all* of the existing traffic, and some new traffic, will depart from Claiborne entirely and concentrate at railroad's terminal in Dorchester County. The fallacy of any such assumption is plain. The railroad was unable to give a satisfactory analysis of its estimate that 32 per cent. of the traffic at Claiborne—or approximately one-third—came from, or was destined for, points below the Choptank River. But if we accept that percentage, although the railroad admitted that it had no real basis for the estimate, and apply it to the traffic *actually carried* across Chesapeake Bay in the best year of business the Claiborne-Annapolis Ferry Company ever had—with three boats available—we find that the railroad's estimate is 32% of 76,352 or 24,432. At $3.00 per car, this will produce an annual revenue from automobiles of $73,296. In 1929, the appellant carried 260,950 passengers (R., p. 117), and 32% of that number is 83,504. At 50 cents each, a passenger revenue of $41,752 is estimated. The total estimated revenues on this basis will be $115,048 for the first year of operation. This is on the assumption that the railroad will get 32% of the traffic now carried by the appellant, although we do not believe that any such result is possible, or that the railroad's ferry busi-

ness, with all new trade that could be fairly assumed, will reach anything like the figure of $115,048.

The railroad, as has been pointed out estimates expenses and charges for the first year of ferry operation of $247,-567, excluding depreciation, etc. To meet these costs the railroad will have but $115,048, applying its percentage to traffic *actually known to cross the Bay* (in 1929). The deficit for the first year, excluding depreciation, etc., would be $132,519.

The State of Maryland has a vital interest in its local highways; the Interstate Commerce Commission, in this proceeding at least, has manifested no such concern. The concluding paragraphs of its report evince, in our opinion, such a callous disregard of local welfare that it is quoted as follows with our own underscoring:

> "It is concluded from the record that, *assuming that both the Annapolis Ferry and the proposed ferry may survive,* the applicant's proposal herein will be in the public interest. Failure of the project would result in no worse transportation conditions than now obtain *unless, perchance, the intervenor's ability to perform service* meanwhile were seriously impaired. The time within which a volume of traffic sufficient to support the new venture may materialize is problematical, but it would seem that there is *at least the* possibility that a remunerative traffic eventually may be developed" (R., p. 31).

Upon the whole case, it is submitted:

1. That the Interstate Commerce Commission's certificate pretends to grant authority to establish a general ferry service, from point to point within the State of Maryland, and is, therefore, null and void.

2. That the Commission's certificate cannot be construed merely as authority to extend the railroad line for railroad purposes.

3. That even if so construed, there is no evidence, or no substantial evidence, of any present or future public convenience to be served by the extension of the railroad line by ferry, and that the Court below erred in finding substantial or sufficient evidence to support the Commission's finding and the certificate based thereon.

4. That the appellant has the right to maintain this action.

5. That the Court below erred in dismissing the bill and in refusing to grant the relief prayed for.

Wherefore, it is respectfully submitted that the decision and decree below should be reversed.

Respectfully,

PHILIP B. PERLMAN,

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Attorneys for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 454.

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
Appellant,

versus

UNITED STATES, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

APPELLANT'S REPLY TO BRIEFS FOR APPELLEES.

PHILIP B. PERLMAN,
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Attorneys for Appellant.

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I.

THE COMPLAINANT IS A PROPER PARTY.

In their briefs, the United States and the Interstate Commerce Commission, and the Chesapeake Beach Railway Company, contend that there is no statute defining the class of persons authorized to maintain an action of the nature involved in these proceedings.

The appellees overlook entirely the provisions of Section 212 of the Judicial Code, referred to on page 47 of our brief. This section appears to have been inadver-

tently omitted from United States Code Annotated, but it has never been repealed and is still the law. Its provisions are similar to those contained in paragraph 20 of Section I of the Transportation Act, where it is provided that suit to enjoin construction, operation or abandonment contrary to the Act may be brought by, among others, "any party in interest." This phrase has been construed in Western Pacific California Railroad Company v. Southern Pacific Company, decided November 23, 1931, this Court saying:

> "If, as the court below seems to have assumed, a 'party in interest' must possess some clear legal right for which it might ask protection under the rules commonly accepted by courts of equity, the paragraphs under consideration would not materially aid the congressional plan for promoting transportation. On the other hand, there was no purpose to permit any individual so inclined to institute such a proceeding. The complainant must possess something more than a common concern for obedience to law. See Massachusetts v. Mellon, 262 U. S. 447, 488. It will suffice, we think, if the bill discloses that some definite right possessed by complainant is seriously threatened or *that the unauthorized and therefore unlawful action of the defendant carrier may directly and adversely affect the complainant's welfare by bringing about some material change in the transportation situation.* Here, the petitioner was peculiarly concerned; its own welfare was seriously threatened." (Italics ours).

The appellees contend that we are not a proper party because we do not possess an exclusive franchise from the State. We submit that there is no statutory or even common-sense requirement for any *exclusive* right before we may protest against an unlawful interference with our business. All that is necessary is that our welfare should be illegally threatened by a "material change in

the transportation situation," and that change is conceded, at least by the Railway Company, which estimates to deprive us of one-third of the patronage we now enjoy.

It is, perhaps, unnecessary to discuss the claim, made in Railway Company's brief, that, *on the pleadings*, the presumption is that the appellant did not have any franchise at all from the State of Maryland at the time of the hearing of this case before the Interstate Commerce Commission. The assertion is rather brazen, and the Railway Company knows that it is not founded on fact. The record contains reports filed by the appellant with the Public Service Commission of Maryland, beginning in the year 1922 (R., p. 185). It is not to be presumed that the Public Service Commission would assume jurisdiction over and accept annual reports from a common carrier operating without a franchise, and, moreover, the bill alleges distinctly that the appellant operates by virtue of a franchise granted by the State of Maryland.

II.

THE RELIEF SOUGHT IS NOT FUTILE.

The Government contends that, if the order is set aside upon the ground that the Commission was without power to make it, this would give appellant no relief "because such a decision would not set up any bar against continuation of the ferry project; it would, at most, merely advise the State of Maryland that it had jurisdiction over the proposed ferry line."

It is rather difficult to follow this reasoning. The appellant contends that authority for the general ferry may be granted only by the State of Maryland. The Railway Company seeks permission from an agency of the Federal Government, necessarily somewhat removed from contact with the local problems and situations. The ap-

pellant is subject to regulation by the State of Maryland, but its proposed competitor, if successful here, will not be bound by requirements as to rates, service, etc., which are imposed by the State. Certainly a single jurisdiction is preferable to a divided jurisdiction, and certainly the Federal Government, unless possessed of occult powers denied to the appellant, is unable to say, in advance of any consideration by the State, that a decision that the question must be decided in Maryland would not set up any bar against the ferry project. In order to reach this conclusion, the Government determines for itself that the State regulations would be no more onerous than those imposed by Federal authority, and also that the State's action on the application not yet made to it must be favorable.

The Government also (p. 19) says:

> "appellant cannot at one and the same time derive its right to bring this suit from the Act and assert that the Act does not apply to the subject matter of the controversy."

The Government misunderstands the appellant's argument. We do not assert that the Act does not apply, but we do contend that the evidence does not authorize the Commission to exercise its powers. If the Government's proposition had any substance, then nobody could complain against the Commission's illegal acts.

III.

NEW YORK CENTRAL & H. R. R. CO. VS. HUDSON COUNTY IS NOT IN POINT.

The New York Central was operating a railroad ferry from the New Jersey shore to New York. This railroad operation was regulated by the Interstate Commerce Commission. The ferry was operated in part as a gen-

eral ferry, carrying non-railroad passengers and property between New Jersey and New York. The Board of Freeholders of Hudson County, N. J., attempted, by ordinance, to prescribe rates for the non-railroad operation of the ferry.

In denying the right of Hudson County to regulate such rates, this Court held in substance that, since the Interstate Commerce Commission had jurisdiction over the interstate railroad operation, it also had jurisdiction over the interstate non-railroad business of the same ferry.

In order to bring the case at bar a little closer within his conception of the Court's decision in the New York Central case, counsel for the appellee railroad attempts to show by an extended argument that the general ferry operation of the proposed Chesapeake Beach Ferry would be in interstate commerce. Although about one-fourth of the railroad's entire brief is devoted to a discussion of this proposition, it may be answered very briefly.

In the New York Central case, an existing railroad ferry admittedly under the control of the Interstate Commerce Commission, was in operation. The question presented to this Court was whether the non-railroad interstate business of this ferry was also within the control of the Federal Government. If, in the case at bar, the power of the Interstate Commerce Commission to authorize the establishment of a railroad ferry were admitted, then the question of the Commission's control over the non-railroad business *might* be governed by the New York Central case, if the non-railroad business were actually in interstate commerce (which we do not believe).

That, however, is not the question here presented. The precise question is first, whether the Interstate Commerce Commission has the power, under the showing made in this case, to authorize the establishment of a railroad ferry. That question must be decided in favor of the appellees before the New York Central case becomes even remotely in point.

The power of the Interstate Commerce Commission to authorize the proposed ferry depends upon whether there has been a sufficient showing of a public need for a railroad ferry. Whether the evidence is sufficient upon that point to be deemed "substantial" is the primary question here involved. If the Court should determine that the evidence of public necessity for a railroad ferry is sufficient to support the certificate to that effect, then and only then will it become necessary to determine whether the Interstate Commerce Commission has the power to authorize the operation of a general ferry for intrastate traffic in addition to the railroad ferry.

IV.

THERE IS NO PUBLIC NEED FOR THE EXTENSION OF THE CHESAPEAKE BEACH RAILWAY.

We submit that the briefs of the appellees are convincing as to the lack of any public convenience or necessity for the extension of the railroad line by ferry, and support the charge that the application is a pretence to gain Federal permission for the establishment of a general ferry from point to point within the State of Maryland.

It is a rather pathetic showing of "public convenience and necessity" for a railroad, contemplating the expenditure of more than $1,000,000, to rely on the testimony of only one prospective customer. The Government, in its brief, and the railroad, in its brief, single out the testi-

mony of Edgar Morris (R., p. 100) as proof that at least somebody will ship freight via railroad and ferry. As a matter of fact, however, Mr. Morris gave no such assurance. He did use the phrase "less than carload shipments," which the Government and the Railroad triumphantly smack their lips over, but Mr. Morris, as a reading of the record shows, nowhere indicated he would use the railroad and ferry, but, on the contrary, pointed out that he is now making less than carload shipments to the Eastern Shore. These shipments, as everyone knows, go by motor vehicle trucks, or by representatives who "travel that territory regularly by automobile."

The same misunderstanding with reference to shipments of seed products and perishables was cleared up by the Examiner, when he asked about the movement of that class of freight, and was told that *it would move by truck* (R., p. 82). It is plain, from the statement made by counsel at the time, that the movement of the freight referred to was not by railroad, but by motor vehicles, traveling over the Maryland highways.

We submit that *not a single witness* testified as to any need of extending the railroad line by ferry, either for freight or passenger purposes. It was tacitly admitted that no freight business is now in existence for such a service, and not a single witness testified that there was a public need for any passenger service beginning with the railroad and ending on Seward's farm, Trippe's Bay, Dorchester County. We urge upon this Court that no such business, either freight or passenger, is practical, because, in addition to the inconveniences already pointed out, there is no place for the freight or passengers to go when the journey is completed, unless by foot (for passengers) to Cambridge, ten miles away. How the freight would reach there is yet undisclosed. The Gov-

ernment calls attention, among other things, to the possibility that persons might buy round trip tickets from Washington to the amusement park at Chesapeake Beach and to the Eastern Shore, in order that they might have a water trip in the course of a day's entertainment. It also suggests that persons traveling from the Eastern Shore to Washington might drive their cars to the eastern terminus of the ferry and complete the trip to Washington and return by the ferry and railroad, for the purpose of saving a $5.00 round trip ferry charge for the automobile. These possibilities, of course, nowhere are suggested in the record and, in the opinion of appellant's counsel, deserve no more than passing mention. Their relationship to public convenience and necessity is so remote as to strengthen the statement that there is no substance whatever in the alleged need to extend the railroad line by ferry.

V.

COLORADO V. UNITED STATES AND TRANSIT COMMISSION V. UNITED STATES ARE NOT IN POINT.

Counsel for all appellees contend that, even if there is no evidence of a public need for a railroad ferry, nevertheless the Commission would be empowered to grant the certificate upon the showing of a public necessity for a general intrastate ferry. Support for this contention is said to exist in the two cases set out in the above heading.

This, of course, is not the rule announced in these cases. The rule, as summarized in *Transit Commission, etc. v. United States*, decided by this Court on January 4, 1932, and not yet reported, is that "if, upon the whole proof, the conclusion was warranted that continued operation (of an intrastate line) would in fact unreasonably

burden the interstate commerce of the carrier, the Commission is justified in authorizing abandonment." (Italics ours).

Stated most broadly, the rule of the *Colorado* case is that where the "abandonment" of a "line," even though wholly intrastate, would be necessary or even beneficial to the interstate operation, the Commission has power to order the abandonment. Conversely, where the "extension of a line," even though wholly intrastate, would be necessary or beneficial, the power *might* exist in the Commission to authorize the extension.

In both instances, however, the benefits or necessities must flow from the "abandonment" or "extension" of the "line." In the case at bar, the evidence reveals no benefits from and no necessity for the extension of the line, i. e. for a railroad ferry. If there were any evidence showing a benefit to be derived from the extension of the Railway Company's line by ferry—i. e. by a railroad ferry—the *Colorado* and *Transit Commission* cases *might* have some application here. Under the facts at bar, however, they are not in point.

VI.

APPELLANT'S ALLEGED ILLEGAL PROFITS.

Counsel for the Railway Company devotes considerable space to a discussion of what he terms "monopolistic" and "illegal" profits earned by appellant, the nature of which, he says, do not entitle appellant to seek relief in a proceeding in equity.

It is not believed that this Court will care to examine, in this proceeding, the reasonableness of the return which appellant has earned on its investment. It is sufficient to point out that the Maryland Public Service Commis-

sion is charged with the duty of regulating ferry rates and will not be presumed, certainly in any collateral attack, to have been negligent or derelict in the performance of its functions.

WHEREFORE, having fully answered the various contentions above discussed, it is again submitted that the decree below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 454

CLAIBORNE-ANNAPOLIS FERRY COMPANY, appellant

v.

THE UNITED STATES OF AMERICA, CHESAPEAKE Beach Railway Company, and Interstate Commerce Commission

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the Supreme Court of the District of Columbia (R. 43) is reported in 59 Wash. L. R. 410. The report of the Commission (R. 17) is reported in 166 I. C. C. 293.

JURISDICTION

The decree of the Supreme Court of the District of Columbia was entered June 17, 1931. (R. 49.) Petition for appeal was filed June 17, 1931, and was allowed the same day. (R. 49, 50.)

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

In the court below one of the questions presented was whether the Supreme Court of the District of Columbia has jurisdiction under the Urgent Deficiencies Act of October 22, 1913. Although this is a case of first impression upon the question of jurisdiction, we believe that the court below correctly held that it had jurisdiction. The questions presented in this brief are:

(1) Whether appellant failed to show that the Commission's order subjected it to legal injury and therefore can not maintain this suit.

(2) Whether appellant can maintain this suit if its sole ground of attack is that the Commission had no jurisdiction to enter its order.

(3) Whether there is sufficient evidence to support the jurisdiction of the Commission and its finding of public convenience and necessity.

(4) Whether appellant can question in this suit the railroad's charter power to operate a general ferry.

STATUTE INVOLVED

Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, provides in part:

(3) * * * The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, * * *. (C. 309, 36 Stat. 544; c. 91, 41 Stat. 474; U. S. C., Title 49, Sec. 1 (3).)

* * * * * * *

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. (C. 91, 41 Stat. 477, U. S. C., Title 49, Sec. 1 (18).)

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act

shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates. (C. 91, 41 Stat. 478; U. S. C., Title 49, Sec. 1 (19).)

(20) * * * Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * *. (C. 91, 41 Stat. 478; U. S. C., Title 49, Sec. 1 (20).)

STATEMENT

This is a suit under the Act of October 22, 1913, to enjoin an order of the Interstate Commerce Commission certifying that the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company (hereinafter sometimes referred to as the railroad) of ferry

service across Chesapeake Bay between the eastern terminus of its line at Chesapeake Beach, Md., and Trippe's Bay, Md.

The railroad's line runs from Chesapeake Junction, D. C., to Chesapeake Beach, a distance of about 29 miles. (R. 168–169.) The railroad interchanges freight with the Baltimore & Ohio Railroad Company and the Pennsylvania Railroad Company, with which it connects, and is a party to joint tariffs filed with the Commission. (R. 61, 185.) If ferry service is established, the railroad will sell through tickets from Chesapeake Junction, D. C., to its ferry terminus on the Eastern Shore and will handle package freight from points in C. F. A. or trunk line territory to the same destination. (R. 68, 85–86.)

Appellant operates a ferry across Chesapeake Bay between Annapolis and Claiborne. (R. 111.) At the time of the hearing it also planned to operate ferries between Annapolis and a new eastern terminus to the north of Claiborne on Kent Island. (R. 112.)

The Commission found that the territory east of Chesapeake Bay, sometimes called the Del-Mar-Va Peninsula and sometimes called the Eastern Shore, is, in general, a fertile agricultural section whose natural markets are Washington, Baltimore, and points west; that the only routes to these markets from the southern part of the Eastern Shore are circuitous, due to the fact that there is no ferry service across the Bay south of appellant's ferry to Claiborne; and that the railroad's proposed ferry would shorten the distance

to Washington from representative points in the southern part of the Eastern Shore by 24 miles and by 36 miles from Cambridge, Md., which is a focal point for highways in that region. (R. 21.) The railroad expected its ferries to make the trip across the Bay in one-half hour less time than the ferries operated by appellant between Annapolis and Claiborne. (R. 62, 111.) The railroad's line to Chesapeake Beach, its proposed ferry route, appellant's existing ferry route, and the principal towns and highways of the Eastern Shore are shown on the map printed in the record as Exhibit 2. (R. 144A.)

The proposed ferry route, in addition to serving the business and social needs of Eastern Shore communities having an estimated population of almost 250,000 (R. 83, 137), would open to motor tourists and others a more convenient route between Washington and the Eastern Shore. The route would be more convenient in three ways—a shorter distance by motor, a quicker ferry trip, and avoidance of serious traffic congestion (R. 95, 96, 107-108) on the Washington-Annapolis highway and in the City of Annapolis. Under present conditions Ocean City, Md., Atlantic City, N. J., and Virginia Beach, Va., are about equally accessible from Washington by motor, but the proposed ferry would make the distance to Ocean City from 70 to 100 miles less than to the other two seaside resorts. (R. 93, 96.) The Washington manager of the Tour and Travel Bureau of the American Automobile Association predicted that the proposed ferry would double the traffic

across Chesapeake Bay in two years. (R. 95.) One witness testified that the time required for a trip between Cambridge, Md., and Washington would be practically cut in half. (R. 100.) A resident of Washington estimated that his summer place on the Eastern Shore could be reached in one-half the time needed for the present trip. (R. 101.)

In 1928 residents of the Eastern Shore organized a company for the purpose of operating a ferry across the Bay, selected the route between Trippe's Bay and Chesapeake Beach as a suitable one, secured an option on land at Trippe's Bay and applied to the Maryland Public Service Commission for a certificate of public convenience and necessity. (R. 97–99, 133.) The company did not press this application and later requested the railroad to interest itself in the project and transferred its option to the railroad. (R. 133.)

At the hearing before the Commission the proposed ferry route was strongly supported by the Secretary of the Washington Chamber of Commerce and by the chairman of its Transportation Committee (R. 100, 101), by the Washington manager of the Tour and Travel Bureau of the American Automobile Association (R. 92), by the president of a Washington wholesale distributing company (R. 100), by the office manager of a company engaged in the wholesale fruit and vegetable business in Washington (R. 103), by the manager of a hotel at Ocean City (R. 87), by five Eastern Shore business or professional men (R.

89, 90, 91, 97), and by a resident of Prince Frederick, Md., a town on the western shore of the Bay (R. 90).

During each of the years 1924 to 1928, inclusive, the railroad had a small operating deficit; in 1929 it had a small operating income. (R. 146.) It is in default on the principal and interest of a first mortgage bond issue of $1,000,000. (R. 139.) The railroad estimated the cost of the ferry project at $1,085,442, which it proposed to finance by the sale of $750,000 of new first mortgage bonds and $525,000 in equipment trust certificates (representing 75% of the cost of the two ferries which it would purchase). (R. 20, 139.) All of the railroad's present outstanding bonds are owned by a trustee, who has agreed to accept $600,000 of new second mortgage bonds in full satisfaction thereof. (R. 139–140.) The railroad estimated a substantial net return from ferry operations after allowing for interest on the first mortgage bonds and equipment trust certificates and amortization of the latter. (R. 151.) This calculation was based solely on the estimated revenue from motor vehicles and accompanying passengers; it did not attempt to estimate the revenue from passengers purchasing through tickets from Chesapeake Junction, D. C., to the ferry terminus on the Eastern Shore or from railroad package freight carried by the ferry. (R. 65–67, 147–148.) Operation of the ferry was also expected to increase railroad revenue, but no estimate was made of this additional revenue. (R. 69.)

Appellant, in opposing the extension of the railroad's line by means of ferry operation, contended

that the total actual and potential business was not sufficient to support its own and the railroad's ferry. (R. 113, 118–119, 120.) Nevertheless, it was then engaged in establishing a second ferry route of its own (R. 112) and it was operating at a substantial profit. Between January 1, 1922, and December 31, 1929, its surplus account increased approximately $475,000. (R. 186a, 200a.) Its operating profit, after depreciation, in 1928 was $170,336 and in 1929 was $184,990, representing a return on its average property investment in these years, respectively, of over 28% and over 22%. (R. 198a–201.)

The State of Maryland has long been interested in promoting ferry service across Chesapeake Bay. In 1916, after a number of financial failures in the operation of a ferry between Annapolis and Claiborne, the Governor of Maryland offered a bonus of $50,000 for the inauguration of regular ferry service between these points, an offer which appellant accepted. (R. 111.) Appellant also receives from the State an annual subsidy of $23,000, and the State has given annual subsidies to two other ferry companies operating across the Bay north of appellant's ferry. (R. 116, 120, 132.) The Maryland Public Service Commission advised the Interstate Commerce Commission that it did not desire to make any representations in the present proceedings. (R. 18.) After the Commission had filed its report and order herein, it received a letter from the State Public Service Commission stating that the latter did not waive its

right to test the matter in court if the railroad intended to establish a general ferry for the handling of intrastate traffic without submitting its case to the Maryland Commission. (R. 178–179.)

The Commission found that operation of the railroad's proposed ferry was in the public interest and that its competition would not seriously injure appellant. (R. 31–32.) It concluded that it had jurisdiction and filed a certificate of public convenience and necessity. (R. 32.)

Appellant thereupon filed its bill in equity in the Supreme Court of the District of Columbia to set aside the Commission's order. The railroad answered, denying the jurisdiction of the court under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 220), and alleging that appellant was without legal right to maintain the suit. (R. 8, 11–12.) The Commission moved to dismiss the bill upon both of these grounds and the United States moved to dismiss the bill upon the latter ground. (R. 13, 34.) All three defendants also answered the bill upon the merits. (R. 7–12, 14–17, 34–38.)

The case was heard by a judge of the Court of Appeals of the District of Columbia and the Chief Justice and a justice of the Supreme Court of the District of Columbia. (R. 44.) The court, after holding that it had jurisdiction, construed the Commission's order as authorizing the railroad "to extend its rail line by ferry from the present terminus on Chesapeake Bay to the other side of the Bay," and held that this order was within the Commission's

statutory authority and supported by substantial evidence. (R. 45, 47–48.) The court found it unnecessary to decide whether appellant was the proper party to bring the suit, whether operation of a general ferry was within the railroad's charter powers, or whether the railroad could do an intrastate ferry business without first obtaining authority from the State of Maryland. (R. 47–48.) A decree was entered dismissing the bill for want of equity. (R. 49.)

SUMMARY OF ARGUMENT

I. Suit to set aside an order of the Commission can be brought under the Urgent Deficiencies Act of October 22, 1913, only by one whose legal rights are affected by the order. Appellant has failed to show that the Commission's order subjects it to legal injury. It has no legal right at common law to be free from competition and it has alleged no contract, franchise or statutory grant of exclusive ferry privileges. Since appellant is not a carrier subject to the Interstate Commerce Act, its right to be free from competition can not be predicated upon the provisions of that Act. It can not be assumed in the absence of convincing reasons that Congress intended the Act to confer legal rights upon a class of carriers which the Act does not either regulate or protect.

II. If, as appellant contends, the proposed ferry line is not to be used by or operated in connection with the railroad, and construction and operation of the ferry are therefore beyond the scope of the Interstate Commerce Act, setting aside the Commission's

order would give appellant no relief, since the decision would leave the railroad free to continue its ferry project. Suit can not be maintained under the Act of October 22, 1913, when the judgment which appellant seeks would be futile. Furthermore, appellant can not assert that the Act does not apply to the subject matter of the controversy and at the same time base its right to sue upon the theory that its right to be protected against the competition of the proposed ferry line is derived from the Act.

III. The Commission has jurisdiction to grant a certificate authorizing the construction and operation of a ferry used by or operated in connection with a railroad engaged in interstate commerce. The railroad in its application to the Commission stated that it desired to construct and operate such a ferry and there is evidence that the ferry will be so operated.

In determining the public convenience and necessity involved in the proposed ferry line the Act did not require the Commission to limit itself to consideration of the need for through railroad and ferry service. Every factor bearing upon the need for the proposed ferry, the service it would render, the traffic it would carry, the prospects of financial success, and the possible injurious effect of competition upon appellant could properly be considered by the Commission and were considered by it. There is ample support in the evidence for the Commission's order.

IV. Appellant can not in this proceeding question the railroad's charter power to operate the proposed ferry line. The Commission's order is permissible, not mandatory, and the railroad may, if necessary, later procure additional charter power. In addition, the question of *ultra vires* action can not be made the subject of collateral attack by third persons. Finally, relief against *ultra vires* action can not be obtained in a suit brought under the Act of October 22, 1913.

ARGUMENT

I

APPELLANT CAN NOT MAINTAIN THIS SUIT BECAUSE IT CAN NOT SHOW THAT THE COMMISSION'S ORDER INVADED ANY LEGAL RIGHT POSSESSED BY IT

Under the Act of October 22, 1913, c. 32, 38 Stat. 208, 219, District Courts of the United States are vested with jurisdiction of cases brought to set aside any order of the Interstate Commerce Commission. The statute is silent as to who may maintain such suits, but this Court has held that no such suit can be brought unless the plaintiff has been subjected to or threatened with a legal wrong by the order which is attacked. *Sprunt & Son* v. *United States*, 281 U. S. 249, 255–257; *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 147, 148. The fact that the Commission's order deprived the plaintiff of a competitive advantage is not a sufficient basis for suit. *Sprunt & Son* v. *United States*, p. 256.

We submit that no actual or threatened legal injury to appellant results from the Commission's certificate authorizing the operation of a rival ferry line. The Commission's order may lead to competition where previously there had been no competition, but, apart from statute, appellant has no legal right to be free from competition. It does not claim any grant of exclusive ferry rights either by contract, franchise, or state law. The common law gives a carrier no legal right to prevent a competitor from invading a territory which the former already serves. *Western Pacific California R. R. Co.* v. *Southern Pacific Co.*, No. 51, decided by this Court November 23, 1931. *Pennsylvania R. R. Co.* v. *United States*, 40 F. (2d) 921, 925 (D. C., W. D. Pa.). Cases involving malicious injury are distinguishable. *Tuttle* v. *Buck*, 107 Minn. 145.

We also submit that no legal injury to appellant can be predicated upon the Interstate Commerce Act, because appellant, which operates a local ferry, is not a carrier subject to the Interstate Commerce Act.

We assume that an interested State is legally injured by an invalid order of the Commission authorizing an extension of the line of a railroad and that the State may sue to set aside the Commission's order. The right of a State to maintain such a suit has been tacitly recognized. *Colorado* v. *United States*, 271 U. S. 153. *Transit Commission* v. *United States*, No. 498, decided January 4, 1932. The right of a State to sue is necessarily implied, first, from the

statutory requirement (Sec. 1 (19), *supra*, pp. 3–4) that the interested State be notified and given an opportunity to be heard upon every application for an extension or abandonment, and, second, from the fact that, the statute being a direct limitation upon state power, unauthorized action under the statute constitutes legal injury to the State.

It may also be contended that the Act gives to carriers which are subject to the Act a legal right not to be injured by an invalid certificate of extension to another carrier. The amendments introduced by the Transportation Act, 1920, including those requiring approval by the Commission of any extension of a railroad line, are designed to protect the entire interstate railway system. *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266, 277. Accordingly it might be contended that, in aid of this purpose, carriers subject to the Act are protected against injury resulting from construction of a new line of railroad which would cause wasteful competition. If this contention were well founded legal injury upon which could be based a suit to set aside the order might be implied from the Act where a carrier subject thereto is affected by an erroneous order of the Commission authorizing an extension. In *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, this Court sustained the validity of a certificate of extension granted by the Commission without passing upon the right of another carrier subject to the Act to bring

suit to set aside the Commission's order.* See *Chicago Junction Case*, 264 U. S. 258, 267.

But it is difficult to see how carriers which are not subject to the restrictions imposed by the Interstate Commerce Act can claim any rights thereunder. It can not be assumed in the absence of convincing reasons that Congress intended to confer benefits upon a class of carriers not included in those which it undertook to regulate. If the position of appellant and the railroad were reversed and appellant began to operate a new ferry line in competition with an existing ferry line of the railroad, neither the Commission nor the railroad would have any right under Federal law to interfere with appellant's undertaking.

If the right to sue to set aside an order of the Commission authorizing an extension is not limited to interested States and carriers subject to the Act, there would seem to be no limitation upon the class of those who may bring an independent suit to set aside such an order, and a community or any business

* Two specially constituted District Courts have expressed the opinion that a carrier has no legal right to be free from competition, and therefore can show no legal injury upon which to base an independent suit to set aside an order of the Commission granting a certificate of extension to a rival carrier. *Indian Valley R. R. Co.* v. *United States*, 52 F. (2d) 485, 487 (D. C., N. D. Calif.); *Pennsylvania R. R. Co.* v. *United States*, 40 F. (2d) 921, 925 (D. C., W. D. Pa.). In each of these cases, however, the court found that the Commission's order was valid.

concern threatened with competitive loss by the extension of a railroad line to a rival community or business concern could independently sue to set aside the order of the Commission authorizing the extension. Appellant derives no exceptional rights under the Interstate Commerce Act because it happens to be a carrier.

Since appellant can not show legal injury, either based upon the provisions of the Interstate Commerce Act or apart from that Act, appellant can not maintain this suit.

It does not follow from our contention that there can be no direct test of the validity of a certificate of extension where no carrier subject to the Act is affected. The validity of such a certificate can always be tested by a suit by the interested State.

II

EVEN IF APPELLANT COULD MAINTAIN THIS SUIT UPON THE GROUND THAT THE COMMISSION'S FINDING OF PUBLIC CONVENIENCE AND NECESSITY IS NOT SUPPORTED BY EVIDENCE, IT CAN NOT MAINTAIN THE SUIT UPON THE SOLE GROUND THAT THE COMMISSION LACKED JURISDICTION TO ENTER ITS ORDER

Section 1 (18) of the Act (*supra*, p. 3) requires every carrier subject to the Act to obtain from the Commission a certificate of public convenience and necessity before it shall undertake the "extension of its line of railroad." Section 1 (3) of the Act (*supra*, p. 3) provides that the term "railroad" shall include all "ferries used by or operated in connection with any railroad." Appellant contends that the Commission was without jurisdiction to issue a certificate in this case because there was no evidence that the

proposed ferry line would be used by or operated in connection with the railroad of the Chesapeake Beach Railway Company.

We submit that if there was evidence to support the Commission's finding of public convenience and necessity, and if appellant is therefore limited to the contention that the Commission lacked jurisdiction to enter its order, appellant can not maintain this suit because it will derive no benefit from the relief which it seeks. Setting aside the order for lack of jurisdiction would give appellant no relief, because such a decision would not set up any bar against continuation of the ferry project; it would, at most, merely advise the State of Maryland that it had jurisdiction over the proposed ferry line.

In *Sprunt & Sons* v. *United States*, 281 U. S. 249, *supra*, the Commission's order required certain carriers to equalize their city-delivery and ship-side rates on cotton shipped to ports on the Gulf of Mexico. The carriers subsequently accepted this order, but the shippers attempted to appeal from a decree affirming the Commission's order. This Court, in holding that the shippers could not independently maintain the suit, gave as a ground for its decision (p. 258) that a judgment in the shippers' favor would be "futile" since it would leave the carriers free to continue to equalize rates.

Furthermore if, as appellant contends, the proposed ferry is not one to be used by or operated in connection with a railroad and is therefore beyond the scope of the Interstate Commerce Act, rights with respect

to it must be determined without reference to the provisions of the Act, and, as previously stated (*supra*, p. 14), independently of the Act appellant has shown no legal right to be free from honest competition. Appellant can not at one and the same time derive its right to bring this suit from the Act and assert that the Act does not apply to the subject matter of the controversy.

III

THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE JURISDICTION OF THE COMMISSION AND ITS FINDING OF PUBLIC CONVENIENCE AND NECESSITY

The railroad in its application to the Commission stated that it proposed to establish a ferry "for the transportation of passengers and property" between the terminus of its line at Chesapeake Beach to Trippe's Bay on the opposite shore of Chesapeake Bay. (R. 125.) The application further stated that present and future public convenience and necessity required the establishment of the proposed ferry "so as to afford a direct route by rail and water between the City of Washington and surrounding territory and the eastern shore of Maryland." (R. 125.) The railroad's Chesapeake Beach station is within a few feet of the shore line and the causeway and wharf to the ferry slip will run from the shore directly in front of this station. (Ex. 16, R. 156B.)

The Commission has jurisdiction to issue a certificate of convenience and necessity for any extension of a "line of railroad" by a railroad carrier subject to the Act and the term "railroad" includes any ferry

"used by or operated in connection with any railroad." (*Supra*, p. 17.) The Commission therefore had jurisdiction to enter its order in this case unless the evidence affirmatively establishes that the proposed ferry would not be used by or operated in connection with the railroad line of the Chesapeake Beach Railway Company.

We submit that this is not shown by the evidence, but that, on the contrary, the evidence shows that the ferry line, if constructed, will be operated in connection with the railroad line. An officer of the railroad testified that it would establish both a passenger station and a freight station at the eastern terminus of the ferry, that it would sell through passenger tickets from Washington, D. C., to this station and that package freight would be handled over the combined railroad and ferry lines. (R. 67–68, 85–86.) The relevancy of this evidence is not destroyed because no attempt was made to estimate the volume of such traffic. Since the ferry will tap a source of traffic from which the railroad is now completely cut off, any estimate of the extent of future through railroad and ferry traffic would necessarily be wholly speculative.

The entire evidence in the case does not establish, as appellant seems to contend (brief, pp. 27–36), the inherent improbability of any through railroad and ferry traffic. First, as to passenger traffic. An amusement park is being constructed at Chesapeake Beach. (R. 68, 71.) It is probable, indeed almost certain, that many of those who would use the rail-

road to reach the park would purchase through round trip tickets to the ferry station on the Eastern Shore so as to obtain at a small cost as part of a day's outing a boat trip across Chesapeake Bay and back. The proposed ferry would provide the most convenient route between a large section of the Eastern Shore and Washington, D. C. (*Supra*, pp. 5–6.) Many Eastern Shore residents would probably wish to save the ferry toll for automobiles ($5 minimum for a round trip, R. 67, 154) and would motor to the ferry station and complete the trip to Washington by ferry and railroad.

Second, as to freight traffic. The president of a company located in Washington, D. C., which is a wholesale distributor of gas and electric appliances and which makes less than carload shipments from Washington to towns in the Eastern Shore which the proposed ferry would serve, testified that it could use the ferry to very good advantage in making less than carload shipments to the Eastern Shore. (R. 100.) Appellant suggests that the railroad's ferry would not handle any freight because appellant's freight revenue has been slight although its Annapolis terminus is close to an electric railroad serving Baltimore and Washington. But it appears that appellant does not solicit freight traffic (R. 121), whereas the railroad will have a strong incentive to solicit through traffic since it will receive revenue from both the railroad and the ferry haul.

The railroad expected that operation of the ferry would increase its railroad traffic, both passenger and freight. (R. 69–70.)

Appellant contends (brief, pp. 21–23) that the only evidence which the Commission could lawfully consider in determining public convenience and necessity was evidence relating to the public need for through railroad and ferry service. We submit that this construction of the statute is erroneous.

In *Colorado* v. *United States*, 271 U. S. 153, 168, *supra*, this Court said that the Commission, in determining whether public convenience and necessity required the abandonment by an interstate carrier of a line of railroad wholly within a State, "must have regard to the needs of both intrastate and interstate commerce." It said further (p. 168):

> The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce.

The same considerations govern when an application for a certificate of extension is presented to the Commission. The transportation needs of the local community to be served by the extension is a factor, and may be a compelling factor, in the determination of public convenience and necessity. The earning power of the proposed extension is also a factor of importance since these provisions of the statute are

intended to "prevent improvident and unnecessary expenditures." *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42, *supra*. In determining earning power, the Commission must take into account the entire prospective revenue of the extension. It is therefore immaterial that in this case a very large part of the ferry revenue will be from traffic which does not also pass over the existing railroad line.

If our construction of the law is correct, there is ample support in the evidence for the Commission's finding that the present and future public interest and convenience require the construction and operation of the proposed ferry line. The evidence shows that there is a widespread demand for the proposed ferry by Eastern Shore communities; that the ferry will benefit a section of the Eastern Shore which is now handicapped by circuitous routes to market; that many interests in Washington, D. C., would benefit by the ferry; and that the management of the railroad, after a careful survey, concluded (R. 61–62) that the ferry line would be profitable and would help to sustain the operation of its railroad line. (*Supra*, pp. 5–7.)

The Commission considered and rejected appellant's contention that the competition of the proposed ferry might limit the appellant's ability to furnish adequate service. (R. 30–32.) In view of appellant's increasingly profitable operations and in view of the inauguration of its new ferry route north of the Annapolis-Claiborne route providing more frequent service and a shorter trip than by the proposed ferry,

the Commission was amply justified in concluding that appellant seemed "unduly alarmed" as to the effect of competition and that appellant "should be able to retain all traffic which normally should flow to its ferry." (R. 31–32.)

IV

APPELLANT CAN NOT QUESTION IN THIS SUIT THE RAILROAD'S CHARTER POWER TO OPERATE A FERRY

Appellant contends (brief, pp. 39–45) that the railroad's corporate charter does not give it power to operate the proposed ferry.

First, appellant's contention ignores the fact that the Commission's certificate is permissible and not mandatory. If, in fact, the railroad's charter must be amended to permit operation of the ferry, the railroad may well have decided to obtain the Commission's authority first. Second, the question whether a corporation is exceeding or has exceeded its charter powers can be raised only in a direct proceeding brought for that purpose; it can not be made the subject of collateral attack by third persons. *Cleveland, etc., Ry. Co.* v. *United States*, 275 U. S. 404, 414. *Kerfoot* v. *Farmers & Merchants Bank*, 218 U. S. 281, 287. Third, even if appellant were the proper party to complain, it may not do so in a suit brought under the Urgent Deficiencies Act of October 22, 1913. In *Pittsburgh & West Virginia Ry. Co.* v. *United States*, 281 U. S. 479, this Court held that relief against *ultra vires* action by a corporation could not be included in a bill under that Act to set aside an order of the Commission. It said (p. 488):

Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the district court.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed, or that it should be reversed with directions to dismiss the bill upon the ground that appellant is not entitled to maintain this suit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 454

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
APPELLANT,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CHESAPEAKE BEACH RAILWAY COMPANY, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR CHESAPEAKE BEACH RAILWAY COMPANY.

Opinion Below.

The opinion of the specially constituted District Court is reported in 59 W. L. R. 410 (adv. sheets, June 19, 1931, No. 25) and is set forth in the record (R. 43).

The report of the Interstate Commerce Commission[1] (R. 18) is reported in 166 I. C. C. 293.

Questions.

The appellant, Claiborne-Annapolis Ferry Company, is seeking to set aside an order of the Commission authorizing the Chesapeake Beach Railway Company to extend its railroad across Chesapeake Bay by ferry.

The principal questions in issue before the Court are:

1. The right of a competing carrier like appellant, which is serving a different territory and whose ferry franchise is not infringed, to maintain the present suit.

2. Whether the appellant is entitled to the interposition of a court of equity to protect its present excessive and illegal profits.

3. Whether the order construed as authorizing a strictly railroad ferry is supported by the evidence.

4. Whether the Commission has sole jurisdiction over an extension of an interstate railroad where the extension is over navigable water of the United States, by a ferry intended for both railroad and general vehicular and passenger traffic of an interstate character.

---

[1]For convenience, we shall in this brief usually refer to the appellant as the Ferry Company, the Chesapeake Beach Railway Company as the Railroad, or the Railway Company, and the Interstate Commerce Commission as the Commission.

Statutes Involved.

The pertinent statutory provisions are part of paragraph 3, and the whole of paragraphs 18, 19 and 20 of section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, c. 91, 41 Stat. 456, 477, 478 (U. S. C. Title 49, Sec. 1 (3), (18), (19), (20)), which read as follows:

> (3) "* * * The term 'railroad' as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of such property. The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *"
>
> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of

railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest, and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

Statement.

The statement in the brief for appellant is, except where concerned with the purely procedural steps,

really a part of its argument. The facts recited are largely confined to those supporting its theory of the case. A few corrections will be noted here, while in order to avoid duplication, the others will receive attention in the succeeding portions of this brief devoted to the question whether the evidence of record is sufficient to support the order of the Commission.

The Chesapeake Beach Railway Company is a carrier subject to the Interstate Commerce Act, its line extending from Chesapeake Junction, D. C., through Marlboro, Pennsylvania Junction, and Owings to Chesapeake Beach, Md., 29.04 miles (R. 18). Connection is made at Chesapeake Junction with a line of the Baltimore & Ohio Railroad Company, and at Pennsylvania Junction with a line of the Pennsylvania Railroad Company. Freight is regularly handled in interchange with those carriers (R. 19). The railroad is a party to joint rates with them (R. 61).

On page 5 of the brief for appellant it is stated that the railroad is hopelessly insolvent; that it is in default in the payment of principal and interest of its first mortgage bonds which matured in 1923; and that there are other liens and claims against the property of varying amounts. It should be noted in this connection, however, that all stocks and bonds of the company are owned by William V. Hodges, Trustee (R. 139), who is also the holder of the liens and claims against the property (R. 19). Mr. Hodges has agreed to satisfy and discharge of record the present first mortgage, and all other liens and claims held by him, so that the mortgage to secure the proposed issue of $750,000 of bonds to equip the ferry, will be a first

lien upon all of the physical assets of the company (R. 140). The financing of the venture has not yet received the attention of the Commission, whose approval will be necessary before any securities can be issued (R. 31). The very existence of this litigation is ample evidence that the appellant itself places little reliance in the proposition that the railroad is unable to command sufficient financial resources to support the new enterprise.

In 1929, for the first time in recent years, the railroad earned a net railway operating income of $7,439.59, which was made possible by a reduction in maintenance of way and structures and maintenance of equipment expenses. These economies, however, were not at the expense of deferred maintenance (R. 63). The improved showing was coincident with the assumption of management by Mr. Eugene Fox, the present Executive Vice-President, a man of broad experience in railroad operation (R. 60, 72).

The appellant operates a ferry between Annapolis and Claiborne, twenty miles further up the Bay from the proposed railroad ferry (R. 144A). The territory served by it is naturally distinct from that tributary to the new ferry. Its operations from 1924 to the date of the hearing were profitable and were extremely large in the years 1928 and 1929. These matters will be treated in more detail in a later part of this brief given over to a consideration of the evidence relative to a general vehicular and passenger ferry at Chesapeake Beach.

SUMMARY OF ARGUMENT.

I.

The order of the Commission is valid and may be upheld either (1) when construed as authorizing the construction and operation of a strictly railroad ferry, or (2) when construed as authorizing both a railroad and a general vehicular and passenger ferry.

II.

The lower court properly held that the scope of the order of the Commission, whether covering the operation of a strictly railroad ferry or both a railroad and a general vehicular and passenger ferry, is not necessarily involved in this proceeding. The railroad is required by law to secure permission of the Commission before constructing and operating a ferry in connection with its line, even though it might also be compelled to secure the consent of other authorities with respect to all or any part of the contemplated business.

III.

The lower court properly held that the record discloses evidence supporting the finding of the Commission of a present and future public convenience and necessity requiring the establishment of this ferry. The evidence clearly supports the need for additional transportation facilities of the Eastern Shore of Maryland which will be reached by the proposed ferry. There is substantial evidence of a more specific nature relating to the need for a railroad ferry in the strict sense of the term used by appellant. In determining

whether the venture is likely to be self-sustaining, the Commission may take into consideration both interstate and intrastate traffic, and may likewise take into account general vehicular and passenger traffic as well as that of a strictly railroad nature. The Court will sustain the Commission's order if supported by evidence, and will not itself weigh the evidence or inquire into the correctness of the Commission's reasoning or the soundness of its conclusions.

IV.

The order is valid when construed as covering both railroad and general ferry service. The Commission has exclusive jurisdiction over ferries operated in connection with interstate railroads. This court has definitely determined that the general or non-railroad business of an interstate nature done by a ferry operated in connection with a railroad was subject to the Interstate Commerce Act as it stood before 1920, and was beyond state control. The case where this holding was made, *New York Central & H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 57 L. ed. 499, is controlling in the present case. The provisions of section 1 (18-20) enacted in 1920, empowering the holder of a certificate of public convenience and necessity from the Commission to proceed with construction and operation "without securing approval other than such certificate" constitutes an added assertion of exclusive Federal control over the whole field subject to the jurisdiction of Congress. This field covers all of the business of the proposed ferry of every kind and description because the ferry is not only on a navigable water of the United

States and therefore subject to Federal regulation, but is also within Federal jurisdiction as an instrumentality of interstate commerce forming part of interstate highway movements of busses, trucks and private automobiles.

V.

As a public service corporation, the appellant is entitled to earn nothing more than a fair return upon the value of the property employed in its business. Its present earnings are greatly in excess of such fair return. The operation of the new ferry will leave it with a fair return and it is not entitled to interposition of a court of equity for the protection of the excessive and illegal profits now enjoyed.

VI.

The appellant was without a franchise at the commencement of these proceedings.

Its present franchise is not exclusive and does not extend along the route of the new ferry or within the same territory. As a mere competitor whose business may be hurt to some extent by the operation of the new ferry some twenty miles down Chesapeake Bay, appellant has no standing to maintain the present suit. The provision of section 1 (20) of the Act authorizing suit by any party in interest in certain cases does not apply here beause no violation of section 1 (18-20) is involved.

VII.

The lower court was correct in holding that the railroad had authority under its charter to conduct a rail-

road business, and the operation of a ferry in connection with, or in the extension of, its regular line is an incident of that business. Moreover, its charter power to own and employ steamboats or other vessels to connect its railroad with other points by water communication is, when coupled with the certificate of public convenience and necessity which it holds, sufficient to cover the operation of a ferry. In any event, the question of lack of charter power or *ultra vires* action cannot be raised by the appellant in a collateral proceeding like the case at bar.

ARGUMENT.

I.

A certificate from the Commission was necessary before the railroad could operate a ferry in connection with its line and the scope of the certificate is not necessarily in issue here.

Section 1 (18) of the Act prohibits any interstate railroad from undertaking an extension of its line without first obtaining a certificate of public convenience and necessity from the Commission. The extension of the railroad line across Chesapeake Bay by ferry is an extension within the purview of the statute because of the language of paragraph 3 of the same section defining the term "railroad" as including "ferries used by or operated in connection with any railroad."

The railroad could not construct or operate the proposed ferry except with a certificate from the Commission, without making it and its officers liable to the

penalties of fine or imprisonment prescribed by section 1 (20).

Any sort of ferry operated by the railroad from its present eastern terminus at Chesapeake Beach across the Bay to the Eastern Shore would be a physical and literal extension of its line. The company would unavoidably have some passenger and freight business moving across the Bay which would be handled over the rail line between other points, and this would automatically make its ferry one used by or operated in connection with an interstate railroad, which would require the authority of the Interstate Commerce Commission. At the same time it might be that the proposed ferry could not do a general vehicular and passenger business without a permit from Maryland authorities. If that were true, as appellant urges that it is, the situation would merely be of a type quite common to our system of government, where it is requisite to have official approval of a new enterprise from two jurisdictions, one state, and the other federal. Under these circumstances there would be no established order in which the application would have to be made. It would be equally permissible to seek the consent first of the federal and then of the state authorities, or to proceed in reverse order.

The order of the Commission is not invalid by reason of the failure of the railroad up to this time to secure authority for a ferry from the State. Its scope presents a different question and one which may never arise. It might of course arise if the company undertook construction or operation without state authority and the State or other parties with a legal interest sought to

oppose. But it is not necessarily in issue here, and there is no call for reversal of the decision of the lower court to that effect.

II.

There is substantial and convincing evidence of the necessity for a strictly railroad ferry and the findings of the Commission on this point are conclusive.

(A) *The Evidence on This Question is Substantial.*

The lower court found that there was substantial evidence in the record supporting the need for a strictly railroad ferry (R. 47). The finding of the Commission was to the same effect, since the application before it contained an allegation that the present and future public convenience and necessity require the establishment of the proposed ferry so as to afford a direct route by rail and water between the City of Washington and surrounding territory and the Eastern Shore of Maryland (R. 125), and since it found that the allegations set forth in the application had been sustained (R. 32).

A part of the evidence underlying this finding by both tribunals is quoted in the brief for appellant which subjects it to an intensive process of destructive criticism until it has been made to disappear entirely as if touched by a magician's wand and become no evidence at all.

But unfortunately for appellant, the evidence handled in this fashion is not, as it asserts, all that is disclosed by the record touching on the need for a ferry to handle each of the two kinds of traffic pertaining

to a strictly railroad ferry, (1) passengers from points on the railroad to the contemplated station on the Eastern Shore at Hudson, or in reverse direction, and (2) package or less-than-carload freight. In our view this claim is wholly unjustified because it ignores a very substantial body of testimony, some of which is equally applicable to both a strictly railroad ferry and a general ferry, while other of it bears specifically and solely on a railroad ferry. The testimony which has been overlooked or misunderstood or for some reason left out of what purports to be a complete statement of the record on this phase of the case, is not only of more importance than what is included, but also of such a character as to be the really controlling factor, were the inquiry concerned with the weight of the evidence rather than its existence in substantial measure.

This disregarded evidence consists of, (1) the strong and imposing showing of the comparative isolation of the prosperous and productive lower Eastern Shore of Maryland and Virginia, due to the inadequacy and insufficiency of its transportation facilities, (2) the need for new sources of traffic for the railroad in order to produce revenues requisite for the continuation of its services to the territory now dependent upon it for transportation, and (3) the specific evidence relating to railroad ferry service which is simply overlooked.

1. The present isolation of the lower Eastern Shore of Maryland and Virginia and its need for more adequate transportation facilities abundantly appears.

Mr. Eugene Fox, Vice-President of the Railway Company, who had made a study of the situation with

respect to the ferry project, testified that a great many tourists do not now go to the Eastern Shore by reason of its isolation and lack of transportation facilities (R. 70).

Mr. Charles W. Purnell, manager of a hotel at Ocean City, Md., said that more direct and expeditious communication with Washington was needed to increase the tourist business of Ocean City. A person owning an automobile, he stated, could go very nicely by way of Claiborne, but one without a car has difficulty in getting to Ocean City (R. 87).

Mr. Carroll E. Bounds, a lawyer of Salisbury, Md., testified that his section shipped a great deal of perishable produce in trucks to Washington, that present facilities were rather unsatisfactory, and that a great many of their shippers oftentimes drive the trucks all the way around the head of the Bay by Elkton to get to Washington with their produce. He was interested in the ferry because he favored anything that would open up his section of the country (R. 90).

Mr. John B. Gray, Jr., a lawyer of Prince Frederick, Md., stated that the two parts of the state, the Eastern and Western Shores, were separated by Chesapeake Bay, and that any direct method of communication would be a desirable improvement (R. 91).

Mr. Frank Robbins, a real estate and insurance agent of Cambridge, Md., testified that the people of the Eastern Shore feel that they are not getting all that is coming to them in the way of transportation; that they do not have sufficient outlets for their products, and that in the last five or six years there has been a move-

ment for better transportation and better industrial relationships for the whole peninsula (R. 97).

Mr. Arthur C. Smith, Chairman of the Transportation Committee of the Washington Chamber of Commerce, placed his committee on record as believing that the proposed ferry would open up business relations between the Eastern Shore and Washington. The mode of ingress and egress to and from the Eastern Shore he regarded as unsatisfactory at the present time (R. 100, 101).

Mr. Dorsey W. Hyde, Jr., Secretary of the Washington Chamber of Commerce, said that the Eastern Shore of Maryland is perhaps one of the richest agricultural territories within reasonable access to Washington, and one which should be included in its natural trade area, but is now absolutely cut off except through some such means as the proposed ferry (R. 102).

The testimony of Mr. John M. Dennis, Vice-President of the ferry company, is to much the same effect, although he quite naturally exhibited hostility to any project which would interfere with the present situation under which most East and West traffic between the Eastern Shore and the mainland is forced to take to the highways and to use his ferry. He said that the subject of increased transportation facilities for the Eastern Shore is never quiet, but a perennial matter like the flowers which bloom in the Spring. In 1930 it was a bridge proposition. The Governor of Maryland declared publicly that a bridge to the Eastern Shore must be built, the cost of which was estimated at from ten to forty millions of dollars, with a length of 8¾

miles over water, probably the most stupendous engineering effort of the kind ever attempted (R. 115).

2. The Railway Company, forming a connecting link between Washington, D. C., and Chesapeake Beach, Md., and serving the intermediate territory, is in need of new sources of traffic if it is to continue to perform its present public obligations. It formerly derived most of its revenue from passenger traffic. With the advent of the automobile and improved highways, revenue from this source has for the past five years shown a steady decline, although this has been equalized to some extent by the increase in freight traffic due to the increase in population and business activity of the towns and communities served (R. 62). The year 1929, however, was the only year, in recent times at least, in which there has been a net profit (R. 63). While the prospects for the road for the future are better with the present more experienced and efficient management, there is need for additional sources of traffic if the road is to be assured of survival. Mr. Eugene Fox testified that the addition of the ferry service would enable the railroad to be self-sustaining and to make a return; and that based upon his twenty years' experience as an operating railroad man he thought the operation of the ferry as an adjunct to the railroad would help to rehabilitate it and enable it to earn its way, which it has never done before (R. 71).

3. As already stated, the excerpts from the record set out on pages 27 to 33 of appellant's brief do not, as they purport to do, include all the specific evidence re-

lating to railroad ferry service solely. Mr. Fox stated that the applicant believed that the earnings of both freight and passenger traffic could be materially increased by the extension of a ferry service (R. 62). In explaining how he arrived at his estimate of 182,500 passengers in connection with his revenue calculations, he stated:

> "Assuming that we would handle two hundred and fifty cars per day, average, and the further assumption that each car would contain two paid passengers together with the prospective business that might be handled in connection with bus lines *or in connection with our railroad which would bring the passengers to and from the ferry,* we arrived at that figure" (R. 67). (Italics ours).

Mr. Fox testified that the railroad mileage from Chesapeake Junction to Chesapeake Bay is considerably less than the mileage from Washington to Annapolis by rail (R. 76).

The most important omission, however, on this branch of the case is the complete absence from appellant's attempted full statement of all of the evidence bearing solely on the railroad uses for the ferry, of the testimony of Mr. Edgar Morris, President of the Morris Sales Company, Washington, D. C., wholesale distributors of gas and electric appliances, representing the Pittsburgh Water Heater Company, and the Roberts-Anderson Stove Company. Mr. Morris stated that his company distributed their products along the Eastern Shore from warehouses located in Washington, and that it could use the proposed ferry

to very good advantage in making less-than-carload shipments to the Eastern Shore. The company often makes less-than-carload shipments to Crisfield, Salisbury, and other places located there (R. 100).

The term "less-than-carload" has reference to shipments of goods in quantities insufficient to require a whole railroad freight car. It clearly refers to rail movement because neither literally nor as a result of usage has it any significance in relation to motor truck transportation.

Before considering the weight and effect of this evidence so cavalierly ignored by appellant, it is in order to inquire into the soundness of its contention that the record affirmatively shows that there is no need for a new ferry to handle through package freight, and that this conclusion is established by the fact that its own ferry handled little or no freight in the years 1922-1929 (R. 31, 185). Its Vice-President, Mr. Dennis, when asked point-blank whether he had ever attempted to develop any freight business, admitted that he had not because "Our freight business is developed through the truck. They put freight in trucks, and we get it that way" (R. 121). The ferry company has no incentive to develop this type of traffic. It does a very big business with private automobiles, busses and trucks, and its boats are sometimes so over-taxed that they can not handle all of the business offered (R. 103). The railway company on the other hand would have an incentive to develop this package or less-than-carload freight business, because it would receive not only compensation for the trans-bay movement as in the case of the ferry company, but also revenue from

the movement over its rail lines. The testimony of Mr. Morris conclusively shows that it would get some such business (R. 100).

(B) *Similar Evidence Has Been Held Not Only Substantial But Controlling.*

The next question relates to the criterion by which this evidence is to be weighed or measured. Appellant cites *Application of Utah Terminal Ry.*, 72 I. C. C. 89, 92, as holding "public convenience or necessity," as used in the quoted statute, has been defined to mean a "strong or urgent public need." In that case, however, the applicant sought approval of a short line paralleling a branch of the Denver and Rio Grande Western Railroad Company, which was denied by the Commission, which said in the course of its opinion at page 93:

> "A public need can hardly be predicated upon the demand of three shippers who may desire to introduce the element of competition in order to improve their position in their own competitive field. While one of the purposes of the Transportation Act, 1920, was to preserve competition between carriers, the provisions of paragraphs (18) to (20), inclusive, of section 1 negative any presumption that it was the purpose of Congress to permit the construction of new and competitive lines of railroad where existing facilities are adequate or can be made so by the exercise of available administrative remedies."

The definition of the phrase "public convenience and necessity" must be considered in the light of the facts

in the case in which it is given. Each case must be judged by its own facts. In *Chesapeake and Ohio Railway Co.* v. *U. S.*, 283 U. S. 35, 75 L. ed. 824, this Court said at page 42:

> "There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question."

The Commission, however, must be mindful of the considerations actuating Congress in assuming regulatory control over extensions of interstate carriers, which were summed up by this Court in *Texas and N. O. R. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475, 72 L. ed. 661, 663, as follows:

> "The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest."

Where a common carrier proposes to extend its line into new territory, it must necessarily rely upon estimates of potential traffic, and above all, upon the sound business judgment of its officers with respect to the amount of business that can be attracted. In the very nature of things, future prospects cannot be made the subject of the same sort of definite and certain evi-

dence that is demanded in respect to past transactions, and less evidence and a smaller degree of certainty are requisite.

The development of traffic is necessarily somewhat speculative. In *Construction of Line by Wenatchee Southern Ry. Co.*, 90 I. C. C., 237, the Commission said at pages 255-256:

> "The problems in convenience and necessity cases have been intensified by uncertainty as to how the law should be interpreted. Apparently the earnings in prospect for the applicant will be insufficient for some time to sustain the project as an independent enterprise . * * *. When it is established, however, that a project will render important public service, and its sponsors are willing to assume the risk of loss in the expectation of ultimate gain either directly through the property or indirectly through benefits to themselves and to the shipping community, the requirements as to the public interest may be fully satisfied, although losses to investors seem more probable than gains. * * * The history of railway construction illustrates that prospective tonnage depending for its development upon transportation facilities, rather than tonnage immediately in view, has been the main justification for railway construction. Progress has involved risks. It is not to be presumed that the Congress contemplated discarding, as insufficient, conditions which in the past have furnished the warrant for a constructive policy in the upbuilding of the system of transportation. It is rather to be presumed that the Congress did not contemplate an interpretation of its enactment which, applied as a policy in the past,

> would have prevented the construction of many railway properties now serving the public interest in an important way. Prospective earnings or losses may properly be considered as one of the factors evidencing the public interest, but, taken alone, do not determine whether a particular enterprise is or is not required by public convenience and necessity."

A certificate of public convenience and necessity for the construction of an extension may properly be granted to create additional tonnage and assist in keeping the present line in operation. *Tennessee, A. & G. Ry. Co. Construction,* 76 I. C. C. 593, *New Mexico Central Ry. Co. Construction,* 99 I. C .C. 389, *Oneida & Western R. Co. Extension,* 166 I. C. C. 277.

An extension is in the public interest if it relieves the situation in a territory inadequately served by the present transportation facilities. *Construction of Line by Wenatchee Southern Ry. Co.,* 90 I. C. C. 237, 255, *Gt. Northern Ry. Co. Construction,* 166 I. C. C. 3, 39.

The judgment of the officials of a railroad based upon their knowledge of local conditions and confirmed by their willingness to take the financial risks involved in a new project constitutes substantial evidence in cases of this kind and may properly be given controlling effect. The Commission so held in *Tennessee, A. & G. Ry. Co. Construction, supra,* at page 596, saying:

> "The record is not as conclusive as it is desirable that it should be regarding the future prospects of the proposed enterprise. However, the record is conclusive to the effect that the

existing mileage alone cannot be successfully operated, and affords reasonable warrant for the expectation that the line as completed will be successful. The applicants have expressed their willingness to finance the extension through the sale of stock. They believe the project as a whole can be made a success, and in view of their knowledge of the local situation and their confidence in the future, as attested by their financial undertaking, we conclude that they should be permitted to develop the enterprise."

(C) *Findings of Commission Where Supported By Any Substantial Evidence Will Be Accepted as Binding*

It is well settled that the courts will not attempt to weigh the evidence or to inquire into the correctness of the Commission's reasoning or the soundness of its conclusions.

"It is not for courts to weigh the evidence introduced before the Commission * * * or to enquire into the soundness of the reasoning by which its conclusions are reached * * * or to question the wisdom of regulations which it prescribed * * *"

Assigned Car Cases, 274 U. S. 564, 580.

"But if the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the Commission's action."

Chicago, R. I. & P. R. Co. v. *United States*, 274 U. S. 29, 33.

"The finding of reasonableness, like that of undue prejudice, is a determination of a fact by

a tribunal 'informed by experience.' * * * This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it."

Virginian Ry. v. *United States,* 272 U. S. 658, 665.

"To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province."

New England Divisions Case, 261 U. S. 184, 204.

(D) *The Evidence is Not Only Substantial But Convincing By Its Weight*

The situation presented by the record is that of an interstate railroad with ample transportation facilities suffering from a dearth of traffic in a territory where it is nevertheless performing a necessary public service, while just across the waters of the Chesapeake lies a rich and productive area in comparative isolation suffering from a lack of transportation, but with an active and alert citizenry ready to cooperate with a new enterprise undertaking to supply its needs.

There is likewise the solution offered in the project proposed by the railroad, involving, in part, a combination rail and water service between Washington and the Eastern Shore. Under this plan not only is a ferry to be constructed but considerable expenditures are to be laid out for the extension of the railroad tracks from their present terminus at Chesapeake Beach over

the causeway and wharf to a point parallel with the ferry slip as shown in the corrected Exhibit No. 16, which counsel have agreed to stipulate in evidence since the printing of the original transcript of record herein.* Additional outlays are to be made for a freight station and a passenger station on the Eastern Shore at Hudson. There is evidence in support of the project from the officials of the company who from their knowledge of the local situation express the opinion that both freight and passenger revenues will be increased by this rail and water service. At least one prominent shipper is on record as promising support to the new route.

There is practically no contrary evidence. There was indeed no opposition before the Commission to a railroad ferry—a circumstance of very great importance to a proper understanding of the evidence on this branch of the case. The ferry company intervened on March 31, 1930, or shortly thereafter and before the hearing (R. 58, 157), and the vigorous controversy occasioned by its objections to the general vehicular and passenger phase of the project undoubtedly accounts in no small measure for the prepon-

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*The statement on page 30 of appellant's brief to the effect that a passenger over the railroad intending to use the ferry would be obliged to leave the train at Chesapeake Beach and proceed a distance of 2,200 feet over a wharf to the ferry slip in order to enter the ferry, was based upon an incorrect copy of Exhibit No. 16 which inadvertently failed to show the extension of the rail line over the wharf to the ferry slip as now shown by corrected Exhibit No. 16.

derant attention given the latter in the record and in the report of the Commission. There is, nevertheless, substantial evidence, in view of what is requisite and practicable in support of an application under section 1 (18-20), in favor of a strictly railroad ferry.

To sanction the construction would assuredly not go counter to the purpose of Congress in enacting the convenience and necessity provisions of the statute of preventing interstate carriers from weakening themselves by constructing superfluous lines and to protect them from being weakened by another carrier's operating in interstate commerce a connecting line not required by the public interest.

Appellant, it is true, argues strenuously that the contemplated rail and water line could not compete with busses and trucks. But this is by no means certain. The railroad has not yet gone the way of the stage coach and the canal. There is little prospect that it will in the near future. Its economic strength, seriously impaired by active competitors within the last few years, is beginning to improve with development of sentiment against the over-crowding of highways by commercial vehicles and the present tendency towards increased taxation and regulation of them.

Appellant likewise charges (Brief p. 55) that the proposal in so far as it relates to the extension of the railroad line is a false pretense since the railroad is really seeking to establish a general ferry between two points entirely within the State of Maryland and having no real use or connection whatsoever with its railroad business. This raises the question of the good faith of the application and of the truthfulness of the

officers of the railway company who testified that they did in fact contemplate a railroad extension. These are matters peculiarly within the province of the Commission which had the parties before it and had an exceptional opportunity to arrive at a correct conclusion concerning them. Its report and order shows that is accepted the application as made in good faith and the testimony of the railroad's witnesses as veracious.

In any true analysis of the case the appellant's contentions go to the weighing of the evidence before the Commission, to the soundness of its reasoning, and the wisdom of its conclusions. Matters of this kind are beyond the scope of the issues in a case reviewing the action of the Commission. But while there is no necessity for considering them, we confidently submit that the findings on this branch of the case are not only supported by substantial evidence, but by evidence of a convincing and persuasive nature.

III.

The evidence is overwhelming in support of the convenience and necessity and profitableness of a general vehicular and passenger ferry.

Testimony of the need of a general vehicular and passenger ferry across the bay at Chesapeake Beach was given by ten representative business and professional men of the District of Columbia and the territory in Maryland to be served by the proposed enterprise, including a Washington representative of the American Automobile Association, and the secretary of the Washington Chamber of Commerce, as well as

the chairman of the Transportation Committee of that body.

The evidence abundantly shows that the proposed ferry would be of great advantage to both the people of the mainland and of the Eastern Shore. It would greatly facilitate communication with the four Maryland and two Virginia counties forming what is known as the lower Eastern Shore, which is partly separated from the upper Eastern Shore by the Choptank River and its wide estuary. The lower section, particularly the Maryland counties, would be naturally tributary to the proposed ferry (R. 64). It would shorten the distance from representative points in that territory to Washington by from 24 to 36 miles (R. 21). Even the partisan vice-president of the Claiborne-Annapolis Company in speaking of the Eastern Shore counties admitted "As to the other counties there is an advantage in there where they proposed to put their terminal, but the Northern part gives us the advantage in distance and the Southern part gives them a slight advantage in distance" (R. 119). The proposed ferry by opening up a new route will develop a great deal of new traffic (R. 70).

The part of the traffic from the lower Eastern Shore now using the Claiborne-Annapolis Company's ferry, does so only because the lack of more convenient facilities forces the use of this long and round-about route. The old ferry and the proposed new one are in reality located in different territories. The extension projected by the railroad, therefore, does not involve a duplication of facilities in a territory now adequately supplied but the introduction of ferry facilities in a territory where none now exist.

Officials of the Chesapeake Beach Railway Company gave detailed estimates of anticipated revenues and expenses which indicated that the operation would be profitable (R. 25). This evidence was accepted by the Commission.

The only testimony in opposition was given by Mr. John M. Dennis, Vice-President of the Claiborne-Annapolis Ferry Company, who predicted financial disaster both for his ferry and the new one, if the latter should attempt to operate. This claim is now echoed in appellant's brief, but is effectively controverted by the evidence of record.

Mr, Dennis proved to be an extremely partisan witness who endeavored to support his thesis by a misrepresentation of the past record of earnings of his company. He attempted to create the impression that his company had earned little money, claiming that the large profits in 1929, the last year before the hearing, were "paper stuff" and not earnings at all (R. 121).

When it was suggested that his company had made $175,000 in the year before the hearing, he endeavored to claim that that was a gross and not a net figure, because "you have to pay for repairs and so on. If you were to get away, on two boats, with $55,000 a year for repairs you would do as well as we are doing" (R. 121). When pinned down by further cross-examination, however, he admitted that the cost of repairs were charged to operating expenses (R. 122).

He claimed that there were three years between 1922 and 1927 when the expenses of his company were considerably above its income without allowing for depreciation and other fixed items which do not appear in

an operating statement (R. 122). As a matter of fact the statements of revenue and expenses (R. 187-201) show a deficit for only two years, 1922 and 1923, and even this showing of deficits is erroneous on its face. In the former year the charges to operating expenses included $10,051.51 for depreciation and $5,020.96 for interest. The latter item is not a proper charge to operating expenses and if this error were corrected there would be an operating income of $3,545.60. In 1923 operating expenses included $11,877.23 for depreciation and $4,029 for interest and if the error with respect to the interest item were corrected there would be an operating income for that year of $719.63 (R. 187).

The operations of the ferry company began to be really profitable as far back as 1924. The rate of return it has enjoyed on its fixed capital in the period 1922-1929 is set out in the table below (R. 187-201):

Year	Fixed capital	Operating income	Rate per cent
1922	$199,010.60	$3,545.60	1
1923	255,168.24	719.63	0.2
1924	227,032.00	16,145.15	7
1925	227,032.00	16,238.76*	6
1926	492,797.00	13,117.18*	2
1927	437,852.00	67,962.00	15
1928	448,858.57**	170,336.70	37
1929	878,505.00	184,990.58	21

* Including interest improperly charged to operating expenses.

** Exclusive of cost of motor ship "Dennis" under construction.

The figures of operating income shown in the above table represent what is left out of operating revenues after all operating expenses have been paid, including repairs and depreciation (R. 191-201). The relatively low income for 1926 is accounted for by a charge against operating expenses of $27,063.94, representing the loss of the vessel "Brennan." The fixed capital is the cost taken from the books of the company and represents the cost new without deduction for depreciation. Since the greater part of it was incurred subsequent to the rise in prices incident to the war, and before the present depression, it is undoubtedly materially greater than current cost of reproduction (R. 111, 121). The rate of return disclosed in 1927, 1928 and 1929 is several times what has become accepted as constituting a fair and legal rate of return for property devoted to the public service.

The trend of the ferry company's receipts has been a constantly upward one for all of the years for which figures are contained in the record. Even more than the statement of profits it reveals the extent of the increase in its business. The operating revenues for the years 1922-1929 are shown in the table below (R. 187-201).

Year	Revenues
1922	$104,286.45
1923	123,408.89
1924	157,272.11
1925	185,866.66
1926	209,999.62
1927	277,604.20
1928	310,979.92
1929	359,509.18

These results were obtained by providing modern, up-to-date equipment and giving better service to the patrons (R. 111, 112). The remarkable response to more adequate ferry facilities on the Bay sustains the theory of the proponents of the new ferry that its construction will encourage traffic and will attract patronage of people who are repelled by the longer and more roundabout route to and from the lower Eastern Shore by way of Annapolis and Claiborne.

The trend of highway traffic is upward. Even if the new ferry takes away some of the business in the next few years, the loss will be made up by the increase in other traffic, if past experience is any guide.

The appellant claims that it will be ruined if the new ferry succeeds in taking away the 32 per cent of its business which Mr. Fox believed came from the lower Eastern Shore and would therefore be diverted to a ferry constructed in that territory (Brief, 45). At another place, however, it contends that no such result is possible (Brief, 58), indicating that it does not take the theory of prospective ruin too seriously. But assuming that the upward trend of traffic will not continue in the future, and assuming a constancy of operating expenses, a reduction of operating revenues of 32 per cent will still not ruin the appellant. On the basis of the record of 1928 it would leave a substantial margin over expenses, amounting to $70,818.37, or a return of 15 per cent on fixed capital. On the 1929 basis, while the net profit would be $69,947.64, or about the same, the rate of return would be reduced to 7 per cent—surely far from a ruinous figure.

It is doubtful whether the existing ferry will be greatly affected by a new one twenty miles away. The old ferry will retain the important traffic destined to and from the northern counties which are naturally tributary to it (R. 77, 119). It will merely lose what it now gets by forcing people to inconvenience themselves. If its future prosperity were, in fact, dependent upon a continuation of this state of affairs, its prospects would be very poor indeed, because it stands to reason that even if the Chesapeake Beach ferry fails to materialize some other form of relief will be obtained by the people of the Eastern Shore. The existing artificial and unnatural monopoly cannot continue.

But in reality the worst result for the Claiborne-Annapolis Company within the range of probability as a consequence of the operation of the Chesapeake Beach ferry, is some diminution of the huge monopolistic profits now enjoyed. The talk of prospective financial disaster is thus far-fetched in the extreme, and it is fully apparent why the Commission paid so little attention to the evidence of Mr. Dennis.

There is no sound reason grounded in the public interest for the protection of the monopoly which the ferry company now possesses at the expense of the inconvenience and loss of a large part of the traveling and shipping public, part of whose traffic is interstate in character. The findings of the Commission on this branch of the case are not only supported by the preponderance of the evidence, but are just and right and should not be disturbed.

IV.

The Commission properly took into consideration intrastate movements and general vehicular and passenger traffic in determining financial prospects of new ferry.

The wisdom of an extension of an interstate carrier usually, if not invariably, involves two questions, (1) the need for the added facilities, and (2) the likelihood of financial success. Tney are closely related because an enterprise fulfilling a real need may with some reason be expected to be successful. In the ordinary situation, therefore, what is evidence of a public need also tends to show financial justification.

In this view, even though it be conceded for the sake of argument that intrastate and general vehicular and passenger traffic of a ferry projected for operation in connection with an interstate railroad are outside of the jurisdiction of the Interstate Commerce Commission, and that it may exercise no regulatory control over such movement, it by no means follows that the needs of such traffic and the revenues which may be anticipated therefrom cannot be considered by the Commission or that the Commission was in error in so doing in this case.

The statute lays down no test which must be met by an application for a certificate of public convenience and necessity, and there is no restriction on the evidence to be considered by the Commission in making its findings on this score. Anything that as a matter

of common sense is reasonably relevant and material may be taken into account. If, as appellant contends, the Commission possesses jurisdiction only over the strictly railroad aspects of the ferry extension, there is nothing in the law which would require it to withhold a certificate unless it were justified by the business solely within its jurisdiction. Neither that class of business taken by itself, nor the class which is beyond its powers, likewise considered separately, might be sufficient to support its issuance, and yet taken together might well afford quite sufficient justification. In this situation it would be absurd for both Federal and State authorities to frustrate the project. The proper course for each authority would be to consider all of the evidence bearing on the whole situation and issue a permit containing appropriate authorization.

It follows that there was no possible error in the course pursued by the Commission in this case in considering the evidence relating to the need for the operation of a ferry at Chesapeake Beach in general vehicular and passenger traffic and the revenues which might be anticipated therefrom.

V.

A ferry used by or operated in connection with a railroad but doing an interstate general vehicular and passenger business is under exclusively Federal control.

A hard and fast distinction is drawn by the appellant between a general ferry business on the one hand and a railroad ferry business on the other. A railroad ferry, it contends, is always one employed as an

integral part of a journey by rail and merely serves as a link in such rail journey, while a general ferry is a part of the public highway spanning a gap of water and subject generally to local control. It cites in support of this distinction, *St. Clair C. O.* v. *Interstate Transfer Company*, 192 U. S. 454; *Golden Gate Ferry Company* v. *Railroad Commission*, 204 Calif. 305; *Fitch* v. *New Haven, New London and Stonington Railway Co.*, 30 Conn. 38; *The Maverick*, 16 Fed. Cas. (No. 9316) 1186; *Chesapeake Ferry Co.* v. *Hampton Roads Transportation Co.*, 133 S. E. (Va.) 561.

All of these cases are distinguishable from the case at bar on a number of grounds, only one of which will be mentioned since standing alone it is sufficient to remove them from consideration. None of them arose under or involves the construction of the Interstate Commerce Act, whose provisions are governing in the present proceedings, and the construction placed upon them by the appellant is opposed to the interpretation by this Court in *New York Central & H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 57 L. Ed. 499, the only case in which the Court has had occasion to construe the definition of "ferries used by or operated in connection with a railroad" by section 1 (3). The decision turns squarely on the issue presented in the case at bar, and, as a decision of this Court, is necessarily controlling. Its importance warrants a somewhat extended review.

The Board of Chosen Freeholders of Hudson County, New Jersey, in 1905 enacted an ordinance fixing the rate of ferriage across the Hudson River to New York on the West Shore Railroad ferry of the

New York Central. The business of this ferry was not limited to persons or traffic carried over the line of the railroad, but embraced a large number of persons and a considerable amount of other traffic constantly moving between the two States, not having used or being destined to use the line of the railroad. The Company brought action in the State courts to enjoin the enforcement of the ordinance, and the Supreme Court of New Jersey ruled in its favor. The decision of that Court, however, was reversed by the Court of Errors and Appeals in *New York Central & H. R. R. Co.* v. *Hudson County*, 80 N. J. L. 305, 74 Atl. 954. The Court relied, among other things, upon the same distinction between a general ferry business and a railroad ferry business as is taken by the appellant in this case, as will appear from the following excerpt from its opinion:

> "Now, so far as appears, the ferry company which figures in the present case was entirely unlike the corporation concerned in the *St. Clair* v. *Interstate Transfer Company Case*. The Weehawken Ferry Company seems to have been incorporated in 1852 with the usual privileges of a ferry company. Its business is the transportation of passengers and vehicles, as is that of any other ferry company. The railroad company, as lessee, is the keeper of the ferry and obliged to conduct the business of the ferry. There is no ground disclosed in the record which puts it upon the same footing as the Interstate Transfer Company. Regarding it as a ferry, or as a ferry similar to the Gloucester ferry, the question is whether it has been definitely settled by the Federal Supreme Court that the regulation of its tolls charged by its keeper in New Jersey is

not a subject for regulation by the State of New Jersey."

The Court relied upon the same Interstate Transfer Company case that was cited by the appellant in its brief to show the difference between a railroad and a general ferry. The Court correctly pointed out that the West Shore did a general ferry business whereas the Interstate Transfer Company's operations were confined to the floating of railroad cars across the Mississippi River.

Pushing its distinction further, and answering the contention of counsel for the railroad company, that Congress had taken jurisdiction over ferries operated in connection with railroads when it passed the Interstate Commerce Act, the Court proceeded to say:

> "It is again insisted that the regulation by the State of New Jersey is excluded because Congress has legislated concerning ferries operated in connection with railroads. The Congressional legislation thus alluded to is said to be contained in Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154) and the amendments thereto; but all interstate commerce is not included within the operation of that statute. A ferry is not included. It is true that, when a railroad company uses and operates a ferry, the latter, as a part of the railroad, becomes subject to the Commission's control over railroads. Jud. Int. Com. par. 104, 105. The rates charged by a railroad company for passage over its routes, may be regulated; but the rates charged for ferriage simply, disconnected from the railroad transportation, are not

under the control of the Commission. Indeed, upon neither had the Commission the power to fix rates until the amendment was approved June 29, 1906 (34 Stat. 564, c. 3591), and so cannot affect the decision of this case, because not in existence when the certiorari in this case was sued out on May 1, 1906."

When the case reached this Court the judgment of the Court of Errors and Appeals was reversed. This Court stated in the course of its opinion:

"As, therefore, the claim on the one side of an all-embracing and exclusive Federal power may be, temporarily, at least, put out of view, and the assertion on the other of an absolutely exclusive State power may also be eliminated from consideration, because not relied upon, or because it is both demonstrated and admitted to be without foundation, it follows that to dispose of the case we are called upon only, following the ruling in the Gloucester Ferry Case, to determine the single and simple question whether there has been such action by Congress as to destroy the presumption as to the existence in the State of vicarious and revocable authority over the subject. We say simple question because its decision is, we think, free from difficulty, in view of the express provision of the 1st section of the Act to regulate commerce (Act of February 4, 1887, Chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154), subjecting railroads as therein defined to the authority of Congress, and expressly declaring that the term 'railroad' as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any cor-

poration operating a railroad, whether owned or operated under a contract, agreement, or lease." * * * "The inclusion of railroad ferries within the text is so certain and so direct as to require nothing but a consideration of the text itself. Indeed, this inevitable conclusion is not disputed in the argument for the defendant in error, but it is insisted that, as the text only embraces railroad ferries, and the ordinances were expressly decided by the Court below only to apply to persons other than railroad passengers, therefore the action by Congress does not extend to the subject embraced by the ordinances. But as all business of the ferries between the two States was interstate commerce within the power of Congress to control, and subject in any event to regulation by the State as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried on by means of the ferries, free from control by the State. We think the argument by which it is sought to limit the operation of the Act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from State to State is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested."

This New York Central Ferry case is of controlling importance in connection with the case at bar because it establishes a federal rule diametrically opposite to

the contention so assiduously advanced by counsel for appellant that in construing the Interstate Commerce Act a distinction must be taken between a railroad ferry and a general ferry. It hews to the line of language used by Congress in defining the type of ferry subject to the Act, as one used by or operated in connection with a railroad. It settles beyond a peradventure of a doubt that Congress in the original Act of 1887 assumed control not only over the railroad business done by a ferry used by or operated in connection with an interstate railroad, but also over all of its non-railroad business of an interstate nature. This was recognized by the Court in *Vidalia* v. *McNeely*, 274 U. S. 676, 71 L. ed. 1292, 1295 where it said:

> "The transportation of persons and property from one state to another is none the less interstate commerce because conducted by ferry; and it does not admit of question that ferries so employed are subject to congressional regulation. Congress has adopted some measures to promote the safety of this form of transportation (Rev. Stat. 4233 (Rule 7), 4426, U. S. C. title 33, 316, title 46, 404) and also a measure regulating rates on ferries operated in connection with railroads. *New York C. & H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 263, 57 L. ed. 499, 505, 33 Sup. Ct. Rep. 269."

It must be taken as established therefore, (1) that a "ferry used by or operated in connection with a railroad" is not as appellant contends, limited to a strictly railroad ferry, because the broad language employed, as authoritatively construed by this Court, in-

cludes a combination railroad and general vehicular and passenger ferry, and (2) that all of the interstate business, railroad and otherwise, of such a combination ferry has passed under the regulation of Congress and its agent, the Interstate Commerce Commission, and is no longer within the realm of state authority.

VI.

The proposed ferry will do a general vehicular and passenger business of an interstate character.

Since it is settled by the New York Central Ferry case that the general vehicular and passenger business of a ferry used by or operated in connection with a railroad is subject to the Interstate Commerce Act and completely beyond the power of the states to control where it is of an interstate nature, the next question becomes one whether the proposed Chesapeake Beach Ferry will as a matter of fact and of law be engaged in interstate transportation in connection with its general ferry activities. This is an important question because of the growth of highway travel and the tendency toward the integration of the transportation facilities of the nation by combining under the control of the same companies, railroad and bus and truck operation. Busses and trucks move in interstate commerce a huge volume of traffic which a few years ago went by railroad. *Report of the Interstate Commerce Commission for 1931*, pages 101-107. The Commission has recommended and Congress has under consideration the enactment of legislation to meet the new conditions. Under the Federal Aid Road

Act (39 Stat. 355) Congress has appropriated millions to assist in building the interstate highways over which this traffic moves.

The proposed ferry will be used as a continuation of the network of interstate highways connecting the Eastern Shore of Maryland and Virginia with most of the States of the Union by private automobiles and with Washington and other places, by bus and truck. The interest in connection with such a ferry, since the revolution in transportation caused by the introduction of the motor vehicle, is no longer local, as it was regarded in many of the old ferry cases, long since overruled or at least greatly modified and restricted, by the New York Central Ferry case and other more recent decisions of this court, but nation-wide in its scope.

The carriage by the ferry of busses, trucks and private automobiles and some of its passengers will, it is true, be from one point to another within the state of Maryland. But this one fact is not determinative of the intrastate character of the movement. That the service is performed wholly in one state can make no difference, if it is a part of an interstate movement. *United States* v. *Erie R. Co.* 280 U. S. 98, 74 L. ed. 187 (annotated), *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286, 57 L. ed. 226.

It is enough if a carrier participates in the carriage of persons or property originating in one state and destined to another. It is wholly unnecessary that all of the participating carriers should be parties to some common control, management, or arrangement for a continuous carriage or shipment. In *Railroad Commission* v. *Worthington*, 225 U. S. 101, 56 L. ed. 1004,

an order of the Railroad Commission of Ohio was annulled for its attempted effort to fix the rates on lake cargo coal from certain mines to the ports of Huron and Cleveland, all within the state. The coal, however, was intended from the first to be sent to destinations in other states, but by vessels which were not under a common control, management, or arrangement for continuous carriage or shipment with the railroad. The Court said:

> "The situation then comes to this: That the rate put in force is applicable only to coal which is to be carried from the mines in Ohio to the Lake, there placed upon vessels and thence carried to upper lake ports beyond the State. By every fair test, transportation of this coal from the mines to the upper lake ports, is an interstate carriage intended by the parties to be such. And the rate fixed by the Commission which is in controversy here, is applicable alone to coal which is thus from the beginning to the end of its transportation in interstate carriage, and such rate is intended to and does cover, an integral part of that carriage, the transportation from the mine to the Lake Erié Port, the placing upon the vessel and the trimming or distributing in the hold if required so that the vessel may complete such interstate carriage."

The specific point in issue was determined against the contention of appellant as long ago as 1871 in *The Daniel Ball* v. *U. S.*, 10 Wall. 557, 19 L. ed. 999, where the vessel involved was engaged in substantially the same kind of service as is proposed for the ferry in this case. It plied between two points on a river in

the State of Michigan, just as the ferry will ply between two points in the State of Maryland. The Court, however, held that it was subject to regulation under the navigation laws of the United States, saying, (p. 565):

> "In this case it is admitted that the steamer was engaged in shipping and transporting, down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each

> agency acts in that transportation, it is subject to the regulation of Congress."

A railroad line wholly within one State but forming a link in the chain of communication between several States is clearly an interstate railroad. On the same principle, a ferry which forms a link in an interstate highway route is an instrumentality of interstate commerce. When a thing is put to a use directly facilitating interstate commerce, it is an instrumentality of that commerce, and the use to which it is put rather than its general nature is the determinative factor. *Ruck* v. *Chicago, Etc., R. R. Co.*, 153 Wis. 158, 162, 140 N. W. 1074.

A part of the business of the proposed ferry would consist of conveying common carrier busses and trucks over the waters of the Bay, and in this capacity the ferry would be not only a link in the chain of interstate transportation but itself an actual carrier of interstate vehicles with persons and property aboard moving in interstate commerce.

Boats employed in the business of towing into and out of harbors vessels engaged in interstate and foreign commerce have been held by this Court to be instrumentalities of interstate commerce. *Harmon* v. *Chicago*, 147 U. S. 396, 37 L. ed. 216; *Moran* v. *New Orleans*, 112 U. S. 69, 28 L. ed. 653; *Foster* v. *Davenport*, 22 How. (U. S.) 244, 16 L. ed. 248. In the last-named case, the court said:

> "It is quite apparent from the facts admitted in the case that this steamboat was employed in aid of vessles engaged in the foreign or coast-

wise trade and commerce of the United States, either in the delivery of their cargo, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels assisted to their port of destination."

The analogy between a towboat conveying in and out of port vessels engaged in foreign or coastwise trade, and a ferry conveying busses and trucks engaged in interstate commerce over a navigable stream of the United States, is complete in all substantial particulars. The auxiliary agent, the towboat in one instance and the ferry in the other, is engaged in aid of the movement of interstate commerce from point of origin to destination. The States may not regulate busses and trucks engaged in interstate movement. *Buck* v. *Kuykendall*, 267 U. S. 307, 69 L. ed. 623; *Bush & Sons* v. *Maloy*, 267 U. S. 317, 69 L. ed. 627. By the same reason they have no power of control over ferries which perform an indispensable part of the same movement.

VII.

General ferries even though from point to point within the same State are in the Federal field and are now regulated by Steamboat Inspection Service laws.

Every ferry, whether it be a railroad ferry or a general ferry, operating over the navigable waters of

the United States is within the field of permissible federal regulation.

It has been held that Congress may prescribe regulations in connection with ships and vessels which are engaged only in the transportation of goods and passengers between ports and places in the same State over a navigable water of the United States. *State Tonnage Tax Cases*, 12 Wall. 204, 20 U. S. L. ed. 370. See also the *City of Salem*, 37 Fed. 846, 2 L. R. A. 380, 38 Fed. 762, 4 L. R. A. 125.

Section 4426, Revised Statutes of the United States (U. S. C. Title 46, c. 14, par. 404), provides in part as follows:*

> "The hull and boilers of every ferryboat, canal boat, yacht, or other small craft of like character propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life as may be applicable to such vessels, shall, by the regulations of the board of supervising inspectors, also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engineer and a licensed pilot:
>
> "* * * All vessels of above fifteen gross tons carrying freight or passengers for hire, * * * propelled by gas, fluid, naphtha, or elec-

* This Section is copied in full in the Appendix to this brief together with Rule 7—Ferry Boats, extracted from General Rules and Regulations Covering Bays, Sounds, and Lakes, other than the Great Lakes, of the United States Department of Commerce.

> tric motors, shall be, and are hereby, made subject to all provisions of Section 4426 of the Revised Statutes of the United States * * *."

Appellant's own ferryboats are now regulated by the Federal Government under this statute. Its Vice-President, Mr. Dennis, said, "The Government Inspectors can see things the matter with boats that nobody else would dream about: Then you have to put the boats in dry dock and do what they say do" (R. 121). And this is true despite the fact that the ferry company is engaged in a general vehicular and passenger service and does not operate in connection with a railroad. The boats of the projected new ferry would likewise be subject to this federal regulation.

It is difficult to see why, if the Federal Government may make regulations with the respect to safety of operation in all of its phases, it may not make a slightly different regulation covering the matter of certificates of convenience and necessity. If the jurisdiction is present in the one case it is assuredly present in the other. The only real question is whether Congress has reached out and extended its jurisdiction in the latter case.

The validity of navigation laws of this type has long since been sustained. *The Daniel Ball* v. *U. S.*, 10 Wall. 557, 19 L. ed. 999. See also *Vidalia* v. *McNeely*, 274 U. S. 676, 71 L. ed. 1292, 1295. A steam ferry boat engaged in transporting passengers and freight between Astoria, Long Island and New York City across the East River has been held subject to inspection under section 4426. The *Steamboat Sunswick* (D. C. N. Y., 1872), 6 Ben. 112, 23 Fed. Cas. No. 13624.

VIII.

All of the activities of the new ferry will be within the Federal field and the assertion of exclusive jurisdiction by Congress must be given full force and effect.

It sufficiently appears from what has been said that the proposed ferry is subject to the jurisdiction of Congress because (1) it will be used by and operated in connection with an interstate railroad, (2) it will be engaged in a strictly railroad ferry business, (3) it will be engaged in interstate commerce in the general vehicular and passenger phase of its activities, (4) it is an instrumentality of interstate commerce, and (5) it will traverse a navigable water of the United States. Under these circumstances it is subject to Congressional regulation upon every phase of its business. Congress has the right to occupy the whole field if it chooses to do so.

The remaining question is whether Congress has occupied the whole field by appropriate legislation. Under the Act as it stood before 1920, it had assumed complete control to the exclusion of the States, not only over the strictly railroad business of a ferry used by or operated in connection with an interstate railroad, but also over the general vehicular and passenger business of an interstate nature done by such a ferry. *New York Central & H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 57 L. ed. 499. In 1920 the Act was amended by the addition of paragraphs 18 to 20 of section 1. Under paragraph 18 every interstate railroad is prohibited from undertaking an extension

of its line without first obtaining a certificate of public convenience and necessity from the Commission. Paragraph 20 authorizes the Commission to refuse to issue or to issue such certificate and to attach suitable terms and conditions, and then makes the provision, of controlling importance in this case, that the holder of the certificate may *without securing approval other than such certificate* proceed with the construction and operation of the extension. This is plainly the assertion of an exclusive Federal control over a province which has always been entirely within the scope of the Congressional power. This was recognized in *Cleveland, C. C. & St. L. R. Co.* v. *Illinois Com. Com.*, 315 Ill. 461, 146 N. E. 606, 54 A. L. R. 45, in holding that a State Commission has no jurisdiction to permit an extension of an interstate railroad. The Court said:

> "Under paragraphs 18 to 22 of section 1 of the Interstate Commerce Act (24 Stat. at L. 379, chap. 104, as amended Feb. 28, 1920, U. S. C., title 49, section 1), commonly called the Transportation Act, no extension of railway lines can be built, or operation thereon had, without a certificate of convenience and necessity from the Interstate Commerce Commission, and if the construction and connection of this proposed track amount to an extension of a railway line within the meaning of the Transportation Act, the building of such track, and the connection here sought, are matters over which the Illinois Commerce Commission does not have jurisdiction, sole jurisdiction in such matters being vested in the Interstate Commerce Commission."

This Court has never had occasion to consider this precise question. It has, however, in abandonment

cases under the same sections of the Act, held that where a Federal interest is at stake which justifies the occupation of the whole field, exclusive Federal jurisdiction must be sustained. In *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 66 L. ed. 566, the Court annulled a certificate of the Commission authorizing the abandonment in both interstate and intrastate commerce of a railroad located wholly within the boundaries of a State, holding that the statute could not be construed as conferring jurisdiction upon the Commission with respect to abandonment in intrastate commerce without raising grave constitutional questions. At the same time the Court pointed out that the intrastate commerce there involved was of no more than local concern, and that it was not as if the road were a branch or extension whose unremunerative operations might burden the main line and, thereby, affect its utility as an artery of interstate commerce.

In the subsequent case of *Colorado* v. *United States*, 271 U. S. 153, 70 L. ed. 878, the Court made it plain that Congress had with some exceptions not here material, intended to take exclusive control wherever there was a Federal interest upon which the statute could operate. The State of Colorado brought suit to enjoin an order of the Commission granting a certificate of public convenience and necessity to an interstate railroad to abandon a part of its line lying wholly within the State because it was an undue burden upon the remainder of the railroad and upon interstate commerce. In upholding the Commission's order, the Court emphasized that Congress had reserved the full authority to determine whether and to what extent

public convenience and necessity permit of abandonment, saying:

> "This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole. Congress did not in the respect here under consideration, assume exclusive regulation of the common instrumentality, as it did in respect to safety coupling devices. Compare *Southern R. Co.* v. *United States*, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822, *Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280, 293, 58 L. ed. 1312, 1318, 34 Sup. Ct. Rep. 809. It expressly excluded from Federal control that part of the railroad which consists of 'spur, industrial, team, switching, or side tracks located wholly within one State.' See *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co., supra.* But as to the rest of every railroad line used in interstate commerce Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment."

If as to the unexcepted portion of each railroad line used in interstate commerce Congress reserved full authority to determine whether and to what extent public convenience and necessity permit of abandonment, it cannot be doubted that it reserved a like authority over extensions of line. This reservation may be inopera-

tive where, as in *State of Texas* v. *Eastern Texas R. R. Co., supra,* there is no field of Federal concern upon which it can operate; but where there is a Federal interest justifying the occupation of the whole field exclusive jurisdiction must be upheld. And that such is the situation here, there can, as we have already shown, be no reasonable doubt.

It is accordingly submitted that there is no doubt as to the authority of the Commission to grant a certificate of public convenience and necessity covering the extension by ferry in this case both for a strictly railroad business and for a general vehicular and passenger business. It is further submitted that the order should be sustained upon this ground.

IX.

Appellant possesses no legal right to maintain this action.

(A) *Appellant had no Franchise at the Time of the Proceedings before the Commission.*

The bill of complaint does not allege that the Ferry Company operated by virtue of any franchise at the time of the proceedings before the Interstate Commerce Commission. Paragraph 5 of the bill (R. 2) alleges:

> "That the plaintiff *is, and for a long period of time has been* engaged in the business of maintaining, operating and conducting a ferry service wholly within the State of Maryland between the City of Annapolis, in Anne Arundel County,

> on the western shore of Maryland, and the town of Claiborne, in Talbot County, and Matapeake Terminal, Queen Annes County, on the eastern shore of said State, operating ferry boats between said points daily and carrying therein passengers and freight for hire. That the plaintiff *operates* said ferry business by virtue of a franchise granted it by the State of Maryland and has expended large sums of money for ferry boats, * * *" (Italics ours.)

The phraseology employed, was it is believed, deliberately chosen and the failure of appellant to allege that it operated by virtue of a franchise at the time of proceedings before the Commission was not due to any inadvertence. The language used must be construed against the pleader. These circumstances are significant in view of the claim now asserted by appellant that the operation of the proposed ferry would be in violation of its legal rights.

There is thus no showing that the appellant had any franchise at all until after the certificate of the Commission was issued, which is too late for present purposes.

A plaintiff has no right of action for the infringement of his ferry franchise where he does not have a clear right or title. *Carter* v. *Garrett*, 13 Ala. 728; *Organ* v. *Memphis Etc. R. Co.*, 51 Ark. 235, 11 S. W. 96; *Norris* v. *Lapsley*, 5 Calif. 47; *Davis* v. *Connolly*, 104 Ky. 87, 46 S. W. 679; *Davis* v. *Connolly*, 21 Ky. L. Rep. 1459; *Butt* v. *Colbert*, 24 Tex. 355; *Higgins* v. *Hogan*, 7 U. C. Q. B. 401; *Londonderry Bridge Comrs.* v. *McKeever*, Ir. L. R., 27 Eq. 464.

(B) *Even If Appellant Has a Franchise, It Is Not Exclusive.*

If the Claiborne-Annapolis Ferry Company had an exclusive franchise to conduct a ferry business in Chesapeake Bay and in the territory to be served by the appellee, then it would have the right to bring an action against anyone who attempted to infringe its franchise, but such, as we have already seen, is not the case. It does not allege in its bill of complaint nor does it anywhere contend that its franchise is so broad. In this country it is well settled since the decision of this Court in the *Warren Bridge Case,* 11 Pet. 420, 9 U. S. L. ed. 773, that in the absence of express provision, a grant by the State of exclusive privileges is not to be inferred. The present Chief Justice in recently commenting on the opinion handed down by Chief Justice Taney in that case said:*

> "While vigorously attacked at the time, the soundness of this principle, and its importance to a developing country, have been generally recognized."

Appellant's franchise, evidently acquired since the commencement of these proceedings, was secured from the State of Maryland (R. 2), and apparently from the Public Service Commission of the State, since that body is the only State tribunal vested with appropriate

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*Address delivered on the unveiling of the bust of Chief Justice Taney, at Frederick, Md., on Saturday, Sept. 26, 1931.

authority. *Bay Bridge Ferry Corp.* v. *Queen Annes County,* 160 Md. 398. The Maryland Commission held in *Re Baltimore and Eastern Shore Ferry Line, Inc.,* P. U. R. 1925 C. 91, that it did not have the power under the law to grant exclusive transportation privileges over the waters of the Chesapeake Bay and its tributaries.

(C) *Even If Appellant Has a Franchise, It Is Not Over the Route or Within the Territory of Proposed Ferry and Would Not be Infringed by Such Ferry.*

The non-exclusive franchise of appellant, apparently acquired during the pendency of these proceedings, is simply for a ferry between Annapolis on the one hand and Claiborne and Matapeake Terminal on the other. This franchise does not cover the whole world, the whole United States, the whole State of Maryland, or the whole of Chesapeake Bay. It is limited to a route between the points mentioned. It does not extend twenty miles down the Bay to Chesapeake Beach where the new ferry is projected for the purpose of serving a different territory and in large part a new traffic and a different set of customers.

Any financial loss that the appellant might suffer would be due to the fact that it now handles a great deal of business from the lower Eastern Shore to the inconvenience and loss of travellers and shippers, who are compelled to use the long and circuitous route that it affords. Under the circumstances the lower shore is not tributary to or in the territory of the appellant's ferry, and the travellers and shippers there are not

its customers in the proper legal sense of the term for present purposes.

The holder of an exclusive franchise may enjoin the establishment of a competing ferry operating over the same route or within a distance prohibited by statute or, by some authorities, within a reasonably close distance, where the effect is to take away a part of the patronage to which it is entitled. *Sistersville Ferry Co.* v. *Russell,* 52 W. Va. 356, 59 L. R. A. 513 (annotated), 43 S. E. 107, *Hammerton* v. *Dysart,* 1916 A. C. 57, Ann. Cas. 1916 B, 1174 (annotated). There is a division of authority as to whether the holder of a non-exclusive franchise possesses the same right, 25 *Corpus Juris* 1067.

But it is settled that the establishment and operation of a ferry to accommodate a new and different traffic or a different territory from that served by the older ferry is not an infringement of the older ferry's privilege, whether it be exclusive or non-exclusive. This rule has its foundation in the paramount public interest which must be controlling in all cases of this kind and rises above the desire for profit of the franchise holders.

In *Gales* v. *Anderson,* 13 Ill. 413, the complainants sought to enjoin the defendants' operation of a ferry across the Mississippi River within a quarter of a mile of the complainants' ferry which had been previously established under an exclusive franchise. The complainants' franchise had given them a right to establish a landing on the Illinois side of the river within two points three miles apart, and the defendants' ferry was within these limits. The Court held that the com-

plainants' landing did not extend for the whole three miles, but was confined to the actual landing place once it was selected. It held that the franchise was exclusive only over the route between the two termini and was not infringed by a second ferry operating between other points. Justice Caton said at page 424 in delivering the opinion of the Court:

> "The defendants have selected and occupied their landing about a quarter of a mile below that of the complainants, upon or near the township line, landing temporarily at other points, when compelled to abandon their ordinary landing in consequence of high water. With this evidence before us, we cannot doubt as to the location of these two ferries, and the exclusive rights of each are confined to the ferries thus located and used. Should we hold that the complainants' ferry ways extend the whole three miles, as was contended on the argument, we might impose a burden upon them which would render their franchise valueless. If their ferry ways extend this whole distance, then they must be at all times ready to transport all passengers who present themselves within that distance, for they are bound to be prepared to transport all who present themselves on their ferry ways. But admit that their obligations would not be so extensive, still they are certainly bound to afford reasonable accommodations to the travelling public seeking to cross the river at their ferry. There may be, and indeed the evidence shows that there are, several important thoroughfares terminating upon the river within the distance which the complainants claim as their exclusive ferry landing. Shall

> they run a boat to each of these points? If they have the exclusive privilege claimed, they are certainly bound to do so; and then they have two ferries instead of one, when the order certainly establishes but one ferry."

In *Taylor* v. *Wilmington and Manchester R. R. Co.*, 49 N. C. 277, the plaintiff was the holder of an exclusive franchise for a ferry from Wilmington to Eagles Island and from Eagles Island to the further shore of the Cape Fear River. The two ferries were connected by a highway across the island which the ferryman was required to maintain in consideration for his exclusive franchise. The defendant railroad operated a boat from Wilmington to a point on the island at some distance from the ferry landing, carrying persons who either were or pretended to be on railroad business. The plaintiff brought an action on the case for damages for the violation of his franchise. The Court held that he was without a cause of action because the persons carried were not customers of the regular ferry. The Court said:

> "The defendants' depot is on the island, some little distance from the road, and 'the landing place' of the plaintiff. The persons transported by the defendants from Wilmington to the island, did not wish to cross over the island, or to use the road, or to go to the plaintiff's landing; they wished to go to the defendants' depot; but for it, they had no business, or desire to go to the island, and their going was without reference to the plaintiff's ferry, or the road; so they were not his customers.
>
> * * * * * * *

"It is unnecessary to consider the fact that, for fifty years—ever since the island has been used for ricefields, or other purposes—every person has been crossing over the river from Wilmington to the place on the island where his business called him without objection on the part of the plaintiff, or those under whom he claims; we have seen they have a perfect right to do so; they were not his customers. So the learning about 'prescription' and 'dedication' has no bearing. It is also unnecessary to consider the effect of the exception in the deed of the defendants, for as the plaintiff has no cause of action without reference to the exception, that cannot give him one."

In *Hammerton* v. *Dysart* (1916), A. C. 57, Ann. Cas. 1916 B 1174 (annotated), plaintiffs sought a perpetual injunction restricting the defendants from infringing upon their ferry. The ferry of defendants was slightly over a quarter of a mile distant from the older one but served a different neighborhood and was in respect of a new traffic occasioned by the creation of a new public park on the opposite side of the Thames. The trial court held that the ferry set up by the defendants in no way disturbed the old ferry and dismissed the action. The Court of Appeals by a divided bench reversed the decision, and an appeal was taken to the House of Lords, where the Court of Appeals was reversed.

Viscount Haldane held that the plaintiffs had an exclusive ferry, but only within reasonable limits. He pointed out that much of the new traffic was naturally tributary to the defendants' ferry, although some of

it would go around by the old ferry if the more direct route were not in existence. In proceeding to hold that no right of the defendants was violated by setting up a ferry to handle new traffic and serve a different territory, he stated:

> "No doubt abstraction of traffic which would otherwise yield tolls to the owner of a franchise ferry, is a proximate ground of action for disturbance of the franchise. But if the abstraction be effected, not by carrying in the line of ferry, but at a distance, to what must this distance be limited? Surely it must be measured by some right. For the franchise is to take tolls for carrying from point to point or vill to vill only. Merely to carry between other places, even if traffic between the termini prescribed by the franchise is thereby deflected is accordingly no wrong unless some substantive right is also conferred to exclude rival carriage within ascertainable limits. These limits must depend on the right, for to carry outside the line of the ferry can be no wrong, unless some right is violated, and it must be on some such right that the protection of the tolls depends. If it be otherwise, I do not see why abstracting tolls by building a bridge close to the ferry should not be a wrong, and yet it has been decided that it is not actionable. In other words the loss of tolls cannot give rise to the right; it is the right which must be the foundation of the claim for the loss of tolls.
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> * * * * * * *
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> "But he, a ferryman, has a right of another kind. He is entitled to a monopoly of his line of

ferry, and he has a cause of action against anyone who carries either in that line or in another line of ferry so near as to make it an alternative way of carrying between substantially the same points. The other line may be such that the circumstances render it in the main little more than a competitive route for those who would naturally proceed by the old ferry. If so, there is a cause of action for disturbance against anyone who abstracts passengers by setting up the second ferry. But if the new ferry is not of this kind, but is set up in order to carry, not those who desire to follow the old line, but another class consisting of those who wish to go to places which have become frequented and are really and not only colorably different from the old termini and the highways which end in them, they cannot be debarred from using it, and so be indirectly compelled to travel out of their way."

Two cases were cited in *Hammerton* v. *Dysart*, *supra*, involving substantially the same situation, *Newton* v. *Cubitt*, 12 C. B. N. S. 32, 104 E. C. L. 32; and *Tripp* v. *Frank*, 4 T. R. (Eng.) 666. In the former case the Court said:

"The principles by which to decide whether the proximity of a new passage across the water to an ancient ferry is actionable, has not been clearly laid down. It seems reasonable to infer, that, if the franchise of a ferry is established for facility of passage, and if the monopoly is given to secure convenient accommodation, a change of circumstances creating new highways on land would carry with it a right to continue

the line of those ways across a water highway; and it is obvious that the single landing-place which sufficed for an uninhabited marsh, would be utterly inadequate for several towns thronged with industrial mechanics. If one hundred of such laborers pass now to Greenwich where one traveller passed in 1800, it seems oppressive to fix on such a large number of laborers the perpetually repeated loss of three-quarters of a mile of walking, for the sake of the small fraction of the toll which is the profit on each passenger, and unreasonable so to increase that profit. If the public convenience requires a new passage at such a distance from the old ferry as makes it to be a real convenience to the public, the proximity seems to us not actionable."

In the second case, *Tripp* v. *Frank*, 4 T. R. (Eng.) 666, it was said:

"It seems to me that the evidence does not support his action. If certain persons wishing to go to Barton had applied to the defendant, and he had carried them at a little distance above or below the ferry, it would have been a fraud on the plaintiff's right, and would be the ground of an action. But here these persons were substantially, and not colorably merely, carried over to a different place; and it is absurd to say that no person shall be permitted to go to any other place on the Humber than that to which the plaintiff chooses to carry them. It is now admitted that the ferryman cannot be compelled to carry passengers to any other

place than Barton; then his right must be commensurate with his duty.'"

The case at bar is a much more aggravated one than any of those cited. The proposed ferry is much farther away than in any of them. It much more clearly is projected to serve a distinctly different territory than was the case in the decisions relied upon. Its customers are not those which the older ferry can legitimately claim as its own. Just as in *Hammerton* v. *Dysart, supra*, the new ferry is designed to serve a new traffic and other highways, as sufficiently appears from our discussion of this subject in connection with our consideration of the evidence bearing on the need for a general vehicular and passenger ferry at Chesapeake Beach. It is clear that the appellant has no right of action under established principles of law.

(D) *Appellant is a Mere Competitor with Some Prospect of Financial Loss from the Operation of the New Ferry, and as such has no Right to Maintain the Present Action.*

It has already been shown that the appellant has no right to enjoin the construction and operation of the new ferry as an infringement of its franchise. Any right of this nature that it may have is wholly dependent upon what it is entitled to as a mere competitor who will suffer some financial disadvantage. This Court has decided that these circumstances are not sufficient to create a right of action. In *New Orleans M. & T. R. R. Co.* v. *Ellerman*, 105 U. S. 166, 173, 26 L. ed. 1015, 1017, it refused to allow a suit by a competi-

tor to enjoin a railroad company against the operation of a wharf, saying:

> "The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damaged him, the answer is that it does not abridge or impair any such right."

The rule is the same in suits brought to enjoin orders of the Interstate Commerce Commission. Such suits are covered by the Commerce Court Act of June 18, 1910 (36 Stat. 539), and the District Court Jurisdiction Act of October 22, 1913 (38 Stat. 218). The latter statute abolished the Commerce Court and transferred its jurisdiction to the several District Courts of the United States. Neither of the statutes define the class of persons who may bring suits to enjoin an order.

As an intervener before the Commission, appellant is entitled under Section 212 of the Judicial Code to intervene in court, but this does not mean that it is entitled to maintain a suit in its own right. This distinction was clearly drawn in *Alexander Sprunt & Son, Inc., et al.* v. *United States et al.*, 281 U. S. 249, 74 L. ed. 832, where the plaintiffs had intervened before the Commission in a case brought by other shippers, attacking a differential in rates enjoyed by the plaintiffs. The Commission issued an order requiring the carriers to eliminate the differential, whereupon plaintiffs brought suit to enjoin the order. In holding that the lower court had properly dismissed the bill, the Court said:

> "We are of opinion that appellants have no standing, in their own right, to make this attack. Insofar as the order directed elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per 100 pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission, under Section 3 of the Interstate Commeree Act. For, their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding, and if they did so, they became entitled under Section 212 of the Judicial Code to intervene as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order."

Appellant asserts that in the *Sprunt case* no complaint was made that the order was invalid because of want of authority in the Commission to make it, but the complaint was based solely upon the fact that the adjustment caused a financial loss. This is not our understanding of the issues in that case, which is headed as follows (74 U. S. L. Ed. 832):

> "Appeal from the United States District Court for the Southern District of Texas to *review a decree sustaining the validity of an order of the Interstate Commerce Commission* requiring certain railroads to remove in a manner pre-

scribed the undue prejudice and preference caused by their rates on cotton shipped from interior points to ports on the Gulf of Mexico." (Italics ours.)

The appellants there contended that there was no evidence to support the Commission's findings of undue preference and undue prejudice as between the appellants and the interior merchants. They contended further that even if the Commission's findings of undue prejudice and undue preference were valid and even if an equalization of rates were warranted, *the Commission would still be without jurisdiction* to raise the rates paid by the appellants. Quite plainly the validity of the order was in issue as well as the jurisdiction of the Commission to make it.

In *Edward Hines Yellow Pine Trustees* v. *United States et al.*, 263 U. S. 143, 68 L. Ed. 216, lumber manufacturers and dealers brought suit to set aside as void an order of the Interstate Commerce Commission requiring carriers to cease and desist from collecting a penalty charge of ten dollars per day on lumber held at reconsignment points, an order which gave a competitive advantage to rival dealers. In holding that the bill could not be maintained, the Court said:

"But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges, and, but for the prohibition contained in the order, would

> do so. For aught that appears, carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap heretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges."

In both the *Sprunt* and *Hines cases,* the power of the Commission to make the orders under attack, and hence their validity, was challenged. This Court, however, refused to consider the validity or invalidity of the orders because of the absence of a right of action in the plaintiffs. The validity or the invalidity of the order and the power or jurisdiction of the Commission to make it is immaterial unless it appears that the appellant has a right to maintain the present suit.

In a suit like the present one to enjoin an order of the Commission granting a certificate of public convenience and necessity, authorizing the construction of an extension of a line of railroad, *Pennsylvania Railroad Company* v. *United States et al.*, 4 F. (2d) 291, the right of the plaintiff to maintain the action was denied. In that case the Pittsburgh and West Virginia Railroad Company had applied for authority to extend its line into Donora, Pennsylvania, where the Pennsylvania Railroad had for some time enjoyed a monopoly of the business. The latter intervened in the proceeding before the Commission in opposition to the application, and after the certificate was awarded brought its bill to enjoin the action. In denying its right to maintain the suit, the Court said:

"Being threatened by the Pittsburgh & West Virginia Railway Company through its proposed extension, with competition for traffic in the Donora district, the Pennsylvania Railroad Company undoubtedly had such an interest in the application for the extension as entitled it to intervene and be heard. It did intervene and was heard, but that interest alone did not give it a right to maintain an independent suit to set aside the Commission's order. Such a suit can be brought and maintained by a competitor only where some right of its own has been violated by the order. *Sprunt & Son. Inc.*, v. *United States*, 50 S .Ct. 315, 74 L. ed., 832, decided April 14, 1930. True, the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from handling all the traffic flowing into and out of that busy district. But that is a privilege rather than a right —a privilege being enjoyed so long as it shall last, not a right to be asserted, unless it be found somewhere in the law, written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors. It is equally certain that the written law—the Transportation Act of 1920—does not explicitly or implicitly accord a non-competitive traffic area to the first taker as the law accords a trademark to the first adopter."

The appellant cites *Chicago Junction Case*, 264 U. S. 258, 68 L. ed. 667, in support of its right to maintain this action because the plaintiff was there, as here, a party to the proceeding before the Commission. It also cites *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557,

63 L. ed. 772, as holding that wherever one suffers financial loss from a void order of the Commission, he can maintain an action for injunction, but this Court held in *Alexander Sprunt & Sons, Inc., et al.* v. *U. S. et al.*, 281 U. S. 249, 74 L. ed. 832, that such a broad construction of those cases was not justified, saying at page 256:

> "Appellants' present position resembles in all essentials one which was put forward in *Edward Hines Yellow Pine Trustees* v. *United States*, 263 U. S. 143, 147, 148, 68 L. ed. 216, 220, 221, 44 Sup. Ct. Rep. 72, and *United States* v. *Merchants & Mfrs. Traffic Asso.*, 242 U. S. 178, 188, 61 L. ed. 233, 239, 37 Sup. Ct. Rep. 24. There, as here, the plaintiffs were deprived by the order of the Commission of a competitive advantage. But the plaintiffs there, as here, were not subjected to or threatened with any legal wrong. And, since the carriers acquiesced in the order of the Commission, the plaintiffs could not maintain an independent action to annul the order. Appellants' present position is unlike that of the plaintiffs in the cases relied upon. *United States* v. *Hubbard*, 266 U. S. 474, 69 L. ed. 389, 45 Sup. Ct. Rep. 160; *Chicago Junction Case*, 264 U. S. 258, 68 L. ed. 667, 44 Sup. Ct. Rep. 317; *Skinner & E. Corp.* v. *United States*, 249 U. S. 557, 63 L. ed. 772, 39 Sup. Ct. Rep. 375; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22. In each of those cases an independent legal right of the plaintiff was affected by the order which it was sought to set aside."

In a note to the passage from the opinion quoted above, the Court said:

"Two suits were involved in the Diffenbaugh Case. One was against a carrier to recover allowances for substituted transportation facilities alleged to be due under Section 15 of the act. The Interstate Commerce Commission was joined and its order prohibiting the allowances sought to be enjoined because the order would otherwise have constituted a defense to the suit. In the other action, interested carriers intervened as parties plaintiff and persisted in their effort to set aside the order. In *Skinner & E. Corp.* v. *United States,* the right under the last paragraph of Section 4 of the act, not to pay increased rates except when due to reasons other than the elimination of water competition, was clearly the right of the shipper. In the *Chicago Junction Case,* the order violated the plaintiff's right under Paragraph 2 of Section 5 to equal treatment; and the plaintiff, with those similarly situated, was the only person in interest against the order. In the *Hubbard Case,* the challenged order increasing rates was alleged to violate a contract between the plaintiff and the carrier, who, it was alleged, was not subject to the jurisdiction of the Commission."

It might also be added that in the *Chicago Junction Case* the New York Central was alleged to have violated the rights of the Baltimore and Ohio and its other connections under Section 3 (*c*) of the Act, which reads as follows:

"All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper,

> and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

Chesapeake and Ohio Railway Co. v. *United States*, 283 U. S. 35, 75 L. ed. 824, also cited by appellant, is scarcely an authority in its favor in view of the fact that the right of the plaintiff there to bring the suit was not even considered by the Court, as appellant admits. This Court had jurisdiction of the subject matter and its decree affirming the judgment of the court below dismissing the bill is not tantamount to a decision that the appellant there, who was plaintiff below, had a valid cause of action, even though the affirmation was based upon a consideration of the merits. Moreover, the case is distinguishable from the one at bar in essential particulars. It involved new railroad construction in a general territory served by the far-flung lines of the Chesapeake & Ohio, Norfolk and Western, and Virginian railroads. The rights of those carriers in their territories is far from being the same as the right of the Claiborne-Annapolis Ferry Company, a water line of very restricted operation, in a territory not its own.

Western Pacific California R. R. Co. v. *Southern Pacific R. R.*, 76 U. S. L. ed. 120, 52 Sup. Ct. Rep. 56,

decided November 23, 1931, was controlled by the provisions of section 1 (20) of the Act, which are in part to the following effect:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this Section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any Commission or regulating body of the State or States affected or any party in interest."

The extensions prohibited in section 1 (18-20) are confined to those undertaken without a certificate from the Commission. The manifest purpose was to prevent anyone from flouting its authority by beginning construction or operation without its consent. The sole purpose of the law was to make provisions to insure that no future extensions should be made without the approval of the Commission, and the extension of the right to sue to "any party in interest" had as its sole object the protection of the exclusive control of the Commission over the situation by encouraging outside parties to come to its assistance, especially in cases which might otherwise escape its attention. Apart from this, there is not the slightest indication of an intention on the part of Congress to multiply causes of action by creating ones which did not exist before. Had it been the intention to subject to judicial review all of the acts of the Commission under the newly delegated powers, it is reasonable to suppose that clear and express language would have been used.

In the case just cited the Southern Pacific began an extension of its line without seeking a certificate of authorization from the Commission. It is thus to be distinguished from the instant case where a certificate has been sought and obtained, and where the intervention of no third party is needed to protect the jurisdiction of the Commission.

In short there is in the instant case no violation actual or threatened of any right of the appellant derived from general principles of law, or of any statutory right. Appellant has reached a contrary result by a wholly unwaranted interpretation of the cases arising under the act. It has found cases in which a right of action was upheld where the plaintiff was in danger of financial loss, and then jumped to the wholly unjustified conclusion that, by virtue of this fact alone, a suit might be maintained. The appellant failed to apply the real test laid down by this Court in *Alexander Sprunt & Sons, Inc., et al.* v. *U. S. et al.*, 281 U. S. 249, 74 L. ed. 832, namely, whether there was, in the cases cited, violation of an existing legal right coupled with monetary loss. This deficiency destroys the usefulness of the analysis made in the opposing brief. It is undoubted that where the Commission's order is valid, but will result in financial loss to the plaintiff, no action can be maintained. It is also undoubted that where the order is void, but where no legal damage will result to plaintiff, no action can be maintained. But neither can an action be maintained where the order is void and plaintiff will suffer financial loss therefrom, unless a legal right has been vio-

lated. The order of the Commission meant financial loss to the plaintiffs in the Sprunt case and in the Hines case. The orders may have been void for all that was determined by the court. But the court refused to decide the question because the plaintiffs had no right to raise it in either of those cases, just as the Ferry Company has no right to raise it here.

X.

Appellant is not entitled to equitable relief for protection of present excessive and illegal profits.

In the section of this brief dealing with the evidence relative to a general vehicular and passenger ferry it was conclusively shown that, based on an estimate which appellant describes as overexaggerated, the business which the new ferry will take away from it will in no event reduce its earnings below 7 per cent. The evidence shows affirmatively, however, that the rate of return which it would enjoy with the new ferry in operation would be much larger.

The appellant, conducting a ferry business which is affected with a public interest and subject to governmental regulation of profits, is entitled to a fair return upon the value of the property devoted to the public service. But it is entitled to nothing more. It has no legal right to large speculative profits over and above what is necessary to produce the required earnings. In *Smyth* v. *Ames*, 169 U. S. 466, 547, this Court held:

> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand,

what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

The same question was considered at length in the later case of *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 466, 68 L. ed. 456, where the Court said:

"The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled, as of constitutional right, to more than a fair net operating income upon the value of its properties which are being devoted to transportation. By investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he cannot expect either high or speculative dividends, but that his obligation limits him to only fair or reasonable profit."

* * * * * * *

"It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in determining whether the sum of the rates is fair. The investment is made on the faith of a profit, the profit accrues from the balance left after deducting expenses from the product of the rates, and the assumption is that the operation is economical and the expenditures are reasonably necessary. If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so. One obvious way to make the

sum of the rates reasonable, so far as the carrier is concerned, is to reduce its profit to what is fair."

The Company is entitled to a fair return and no more. This Court upheld a rate of return of 6 per cent in *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153; *Stanislaus County* v. *San Joaquin & Kings River C. & I. Co.*, 192 U. S. 201; and *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655. A rate of 7 per cent was sanctioned in *McCardle* v. *Indianapolis Water Co.*, 272 U. S. 400, 419, 420, while 7¼ per cent was held free from confiscation in *Georgia Ry. & Power Co.* v. *Railroad Commission*, 262 U. S. 625. What is a fair rate of return depends of course upon the circumstances surrounding the individual case, but such a return is rarely in excess of 7 per cent.

What the appellant is seeking to protect here is its huge monopolistic profits running in recent years as high as 37 per cent. It will receive not only a fair return but a very liberal one, even with the new ferry operating, and it has no right to the excessive profits now enjoyed over and above that amount, for whose protection it may resort to a court of equity. A decree cannot properly be entered to secure to the appellant the continued enjoyment of these excessive and illegal gains.

XI.

The operation of the proposed ferry is within the charter powers of the railway company.

The charter of its predecessor in title, the Washington and Chesapeake Beach Railway Company, to which

the defendant has succeeded by a series of mesne conveyances, is very broad and confers full power for engaging in the construction and operation of a ferry.

By Section 4 of the said charter, the company was authorized to locate and operate a continuous line of railway from the District of Columbia to Chesapeake Bay

> "with the privilege of constructing such docks, piers, bridges and retaining walls along the bay shore, as may be necessary" (R. 161).

Section 6 provided that it might also

> "purchase, hold, own, sell, lease or otherwise dispose of such lands and premises at the terminal at Chesapeake Bay as may be essential for the establishment at the said terminal of a permanent seaside resort not exceeding in the aggregate 3,000 acres" (R. 161).

By Section 11 the president and directors of the company were

> "invested with all the rights and powers necessary to the construction, working, use and repair of its said railroad, with such branches at any point of said railroad not exceeding twenty miles in length, as the said president and directors may determine" (R. 162);
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> * * * * * * *
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> "make or cause to be made, lateral railways in any direction from the said railroad" (R. 163),
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> * * * * * * *
>
> "and may also own and employ steamboats or other vessels to connect the said railroad or rail-

roads with other points by water communication (R. 163).

The laws of Maryland, Article 23, Section 312, provide that

> "Any railroad company incorporated under the laws of this State may own and operate any line of steamships or steamboats, or may subscribe to or hold the stock of any company owning and operating such steamships or steamboats, where such steamships and steamboats can be used wholly *or in part* in connection with the business of said railroad company." (Italics ours).

The language of the charter taken in conjunction with the provision of the Maryland statute could hardly be more broad and comprehensive. The words "steamboat" and "vessel" are generic terms and include ferry boats and boats of all descriptions. The word "vessel" as applied to maritime affairs, is understood to mean any vehicle used for transportation on the water. *United States* v. *Open Boat* (U. S.) 27 Fed. Cas. 346, 352. It has been held in New York that a ferry boat is a "vessel" within the meaning of Laws 1862, c. 482, as amended by Laws 1863, c. 422, providing that, whenever a debt shall be contracted by the builder of a vessel on account of work done or materials furnished, said debt shall be a lien on such vessel, *Phoenix Iron Co.* v. *Hopatcong*, 27 N. E. 841, 844, 127 N. Y. 206.

If the legislature of Maryland had intended the use of boats by the new company to be confined to a strictly railroad ferry, it is reasonable to suppose that it would have employed definite and precise language to that end. But it did not do so. It left the company free to employ any kind of steamboats or other vessels. It could establish a regular line of steamships carrying freight or passengers or both. Such a steamship line is customarily open to the patronage of the general public, and there is no reason to suppose that the legislature intended to confine the patronage of any such enterprise established by the railroad company to persons and property moving between other points over its rail lines. In fact, the Maryland statute already quoted, authorizes steamships and steamboats to be used wholly *or in part* in connection with the railroad business, indicating a public policy of the State favoring rather than prohibiting the extension of auxiliary service into the non-railroad field. Since a ferry is simply one kind of a steamship, steamboat or vessel, and a kind frequently used by and operated in connection with railroads, it is clear that the legislature intended by the general charter provisions to authorize the company to engage in any sort of water transportation including ferry service, of both a railroad and a general vehicular and passenger nature, that might be necessary or appropriate in the service of the public.

The soundness of this conclusion is particularly manifest when the limited territory within which the Railway Company was intended to operate is considered. It was not projected to run hundreds or thousands of

miles with a far-flung business that might require the auxiliary service of boats in the coast-wise trade covering long distances or even engaged in foreign commerce. Its activities were to be confined by reason of its geographic location to a more or less circumscribed portion of the District of Columbia and Maryland. The water carriage naturally appertaining to a railroad venture of this sort would be largely in connection with local transportation up and down Chesapeake Bay, the only navigable water, with one unimportant exception, reached by the line. Any water transportation in which the Railway Company might engage, therefore, might reasonably be expected to include ferry service.

The Maryland Public Service Commission has held that a charter authorizing a company to operate steamboats and to carry goods includes authority to transport automobiles and their contents, even where such transportation is in the nature of a ferry service. In *Re Baltimore and Eastern Shore Ferry Line, Inc.*, P. U. R. 1925 C. 91, the Commission had before it an application filed by the Baltimore and Eastern Shore Ferry Line for an order restricting the operation of a ferry by the Tolchester Beach Improvement Company between Baltimore and Tolchester Beach, Kent County, Maryland. One of the questions was whether the clause in the company's charter authorizing it to transport goods included the carrying of automobiles and their contents. The Commission dismissed the application saying:

> "It appears that the Tolchester Company has been operating a line of steamboats between

Baltimore and Tolchester, and other points on the Chesapeake Bay and its tributaries for a long term of years, this company's operations being under the authority of a charter granted by the legislature before the Public Service Commission Law was enacted. The company has been conveying passengers and freight ever since it began operations. The goods carried have been of a varied character and have included livestock and vehicles. It has also carried automobiles, and the uncontradicted statement was made at the hearing that the automobiles of the officials of the Baltimore & Eastern Shore Ferry Company were carried to and from Tolchester on the occasion when the ferry company officials made their inspection of the territory in the neighborhood of Rock Hall for the purpose of selecting a terminal for their ferry operation.

"It developed that the Tolchester Company had remodeled certain of its vessels for the purpose of catering more extensively to the business of carrying automobiles and their contents between Baltimore and Tolchester Beach.

"Three issues were raised in this case.

"First, whether the clause in the company's charter authorizing it to transport 'goods' includes the carrying of automobiles and their contents.

"Second, whether the carrying of automobiles and their contents, changes the character of the Tolchester Company's business and makes it a ferry company.

"Third, whether this Commission, under the law, has the power to limit the operations of vessels over the waters of the Chesapeake Bay

and its tributaries or grant any transportation privilege over those waters.

"The findings of the Commission in these matters are as follows:

"That the charter of the Tolchester Company does not prevent it from transporting automobiles and their contents.

"Second, that the transporting of automobiles and their contents does not change the general character of the business which the Tolchester Company has been doing.

"Third, that the Commission has not the power under the law to grant exclusive transportation privileges over the waters of the Chesapeake Bay and its tributaries."

The facts recited by the Maryland Commission plainly show that the Tolchester Company was engaged in a ferry business, and its holding is to the effect that a vehicular ferry business is not so foreign to the transportation of goods by water as to constitute a change in the general character of business previously done by a boat line. On the same theory, the Chesapeake Beach Railway Company would not diverge from the general character of the business authorized by its charter which included the employment of steamboats or other ferries, by engaging in a vehicular ferry business.

By what has just been said it is not meant to put forth the contention that the legislature gave the railroad in its charter a franchise to operate a ferry at Chesapeake Beach or at any particular point, as distinct from the general power to operate a ferry at some location for which it might acquire a franchise,

or what is the same thing, a certificate of public convenience and necessity.

General charter powers are one thing, and the possession of a specific franchise, quite another. The failure to observe this distinction has led the appellant to cite several cases, *Fitch* v. *New Haven and Etc., Ry. Co.*, 30 Conn. 38; *The Maverick*, 16 Fed. Case (No. 9316) 1186; *Chesapeake Ferry Co.* v. *Hampton Roads Transportation Co.*, 133 S. E. (Va.) 561, as showing that the language used in the railway company's charter is not sufficient to convey power to engage in a general ferry business, when in reality they hold only that the particular railroads under consideration did not possess specific ferry franchises where they were operating enterprises of that kind.

Charter powers are of three classes (1) the right to organize and exist, (2) the right to act generally and (3) the special privileges which are not possessed by individuals under general laws, 7 R. C. L. 88. *Detroit Citizens Street R. Co.* v. *Detroit*, 125 Mich. 673, 84 Am. St. Rep. 589, 85 N. W. 96, 86 N. W. 809, *Eastern Products Corporation* v. *Tennessee Coal I. & R. Co.*, 151 Tenn. 239, 269 S. W. 4, 40 A. L. R. 1483, 1493.

It is the privilege of doing that which does not belong to the citizens of the country generally by common right, that constitutes the distinguishing feature of a franchise, 12 R. C. L. 174, *Bank of Augusta* v. *Earle*, 13 Pet. 519, 10 U. S. L. ed. 274; *Peoples R. Co.* v. *Memphis R. Co.*, 10 Wall. 38, 19 U. S. L. ed. 844; *New Orleans Gas Light Co.* v. *Louisiana Light, Etc., Manufacturing Co.*, 115 U. S. 650, 29 L. ed. 516. The right to keep a public ferry is a franchise of the

third class mentioned above; and cannot be exercised by an individual or a corporation without license or legislative grant, either mediate or immediate, 11 R. C. L. 914; *Mills* v. *St. Paul County,* 8 How. 569, 12 U. S. L. ed. 1201; *Munn* v. *Illinois,* 94 U. S. 113, 24 L. ed. 77; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 29 L. ed. 158.

The term "franchise" used in this sense was defined by this Court in *California* v. *Central P. R. Co.,* 127 U. S. 40, 41; 32 L. ed. 157, 158, as follows:

> "A franchise is a right, privilege or power of public concern which ought not to be exercised by private individuals at their mere will and pleasure but should be reserved for public control and administration either by the government directly or by public agents, acting under such conditions and regulations as the government may impose in the public interest and for the public security * * * No private person can establish a public highway or a public ferry or railroad or charge toll for the use of the same without authority from the legislature direct or derived. These are franchises * * * The list might be continued indefinitely."

A franchise in this sense of the term falling in the third group of the classification of powers just referred to, was not, even before the days of modern public service commission laws, always included in the corporate charter of public service corporations. A company might be given by its charter the right of corporate existence and the right to conduct a ferry business. It would then have charter powers of the

first and second classes, that is, the right to organize and exist, and the right to act generally, but it would still be without the power to conduct a ferry at a particular location. This precise question was the point in issue in *Tugwell* v. *Eagle Pass Ferry Co.*, 74 Tex. 480, 9 S. W. 120, where the court said:

> "It becomes important, then, to inquire by what right the appellee claims a ferry privilege. The Court properly found that it had not shown a right by prescription. It is claimed however, that by virtue of its incorporation under the general laws of the state, with power to operate a ferry between Eagle Pass and Piedras Negras, it acquired the right to exercise the ferry privileges claimed by it. But we think this claim is based upon a misapprehension of the scope and effect of our general incorporation laws. Their object is simply to enable individuals to associate themselves together, with the powers, privileges, and incidents of a corporation for the promotion of certain purposes. So far as they relate to ferries, they merely provide a mode by which a corporation may be created for the purpose of maintaining a public ferry. The franchise they grant is the power, as a corporation, by acquiring another franchise, namely, a ferry privilege, to operate and maintain a public ferry. After the incorporation is completed, the corporation has the same right to acquire a ferry property and privilege, and no more. It was certainly not intended to enable any number of individuals, by the mere fact of filing articles of incorporation as required by the statute, to acquire a ferry privi-

lege itself at any point that should be designated in such articles."

Each of the cases cited by appellant was concerned with the existence of the third class of powers; that is, it was concerned with the question whether the legislature had given a franchise for a general ferry at the particular location where it was being operated. Since the asserted right to operate in each case arose before the advent of the modern system of laws governing the powers and franchises of public service corporations, the corporate charter was invoked as a sole repository of all powers and franchises, and the answer given by reference to its terms. This third class of franchises is now commonly granted, not as formerly, in the charter of incorporation, but by means of a certificate of public convenience and necessity such as is provided for by section 1 (18-20) of the Interstate Commerce Act, and by the Public Service Commission Law of Maryland. *Bay Bridge Ferry Corporation* v. *Queen Annes County*, 160 Md. 398.

The question in the instant case is not, as in the cases cited by appellant, whether both general powers, and also a special franchise, are found in the charter. It is rather whether the Railway Company has authority to construct and operate a ferry at Chesapeake Beach by reason of its charter powers, reinforced by the franchise given by the certificate of public convenience and necessity of the Interstate Commerce Commission. In this view the authority is ample.

Moreover, even if the Railway Company had merely the authority to conduct railroad business without the aid of the further powers which are in fact contained

in its charter, it would still, as the lower court correctly held, be fully authorized to engage in the operation of a ferry in connection with its railroad business. Charter authority to conduct a railroad business gives authority to conduct those activities which are ordinarily engaged in by railroad companies. The operation of a ferry in connection with its line comes within this class of activities, as is shown by the definition in Section 1 of the Interstate Commerce Act of the term "railroad" as including, among other things, "a ferry used by or operated in connection with any railroad."

XII.

The question of ultra vires cannot be raised by appellant.

Whatever may be the charter power of the railroad in connection with the operation of a ferry, the question of *ultra vires* is not one that can be raised by appellant. Where a corporation acts beyond its charter power the proper remedy is a direct proceeding by the State, and private individuals have no right to set the matter up collaterally.

Cleveland C. C. & St. L. R. Co. v. *U. S.*, 275 U. S. 404, 72 L. ed. 338.

Blair v. *Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801.

Fritts v. *Palmer*, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. ed. 317.

Union Natl. Bank v. *Matthews*, 98 U. S. 621, 25 L. ed. 188.

Ohio, etc., R. Co. v. *McCarthy*, 96 U. S. 258, 24 L. ed. 693.

In *Camblos* v. *Philadelphia and R. R. Co.*, Brewst. (Pa.) 563, Fed. Cas. 2331, the Court held that an appropriation by a railroad company of the profit of a business of which an express company before had the monopoly does not thereby incur any liability to the express company nor give the latter the right to call the railroad company to account on the ground that the power to conduct such business was not conferred by the railroad company charter.

In *New England R. Co.* v. *Central R. & Electric Co.*, 69 Conn. 56, 36 Atl. 1061, injurious competition alone was held not to give a railroad company the right to contest the power of a street car company to extend its line so as to parallel the line of the railroad company, without first having obtained an order of public convenience and necessity, on the ground that the act of the street car company in building its line without such order was *ultra vires.*

In *Burns* v. *St. Paul Street R. Co.*, 101 Minn. 363, 112 N. W. 412, 12 L. R. A. (N. S.) 757, the plaintiff sought to enjoin as *ultra vires* the placing by the defendant street railway company of advertisements inside its cars. The Court held that the plaintiff had no right to bring such an action because the case was not one where a court of equity could interfere, not only upon the information of the Attorney General, but also upon the information of private parties directly affected.

In *New Orleans, M. & T. R. R. Co.* v. *Ellerman*, 105 U. S. 166, 173, 26 L. ed. 1015, 1017, the Court, in directing the dismissal of a bill brought by a competitor to enjoin a railroad company from the operation of a wharf, said:

"The legal interest which qualifies a complainant other than the State itself to sue, in such a case, is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. A stockholder of the Company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellant has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the Railroad Company damages him, the answer is that it does not abridge or impair any such right. If he alleges that the Railroad Company is acting beyond the warrant of the law, the answer is that a violation of its charter does not of itself injuriously affect any of his rights. The Company is not shown to owe him any duty which it has not performed."

In *Cleveland, etc., Ry. Co. v. United States,* 275 U. S. 404, 72 L. ed. 338, the planitiff sought to set aside, under the Urgent Deficiencies Act, an order of the Commission requiring a railroad to make connection with a switch track leading to an adjacent coal mine. It was contended by the plaintiff that the operation of the switch track by the mining company was *ultra*

vires, and that therefore, the Commission's order requiring of the railroad connection with and switching operations over the tracks to the mine, was illegal, and should be set aside under the statute. In denying this contention and sustaining the Commission's order the Supreme Court said:

> "The argument is that under the law of Illinois only a public track may cross a highway; that an Illinois mining corporation has no power to build a public track; that since the coal company is an Illinois corporation the construction of the track was *ultra vires;* that hence, whether the track be public or private, it is an illegal structure and that consequently it is not a track 'which may be constructed' within the meaning of paragraph 9. Congress obviously did not impose upon the Interstate Commerce Commission the duty of determining, before issuing an order, whether or not a private track actually in existence had been constructed by the shipper *ultra vires.* Whether in so acting the shipper transgressed powers conferred upon it by the state is a question which cannot be raised in this suit. If the state concludes to question the legality of the shipper's acts, it must do so in a direct proceeding instituted by it for that purpose. *Kerfoot* v. *Farmers & M. Bank,* 218 U. S. 281, 287, 57 L. ed. 1042."

Pittsburgh & West Virginia Railway Co. v. *United States,* 281 U. S. 479, 74 L. ed. 980, 984, was an action under the Urgent Deficiencies Act to set aside an order of the Commission granting permission to the Wheeling & Lake Erie Railway Company to join with other railroads in establishing and using the union station

and terminals at Cleveland, Ohio, under an arrangement submitted to and approved by the Commission as being for the convenience and necessity of the public. One of the grounds upon which the court was asked to set aside and annul the Commission's certificate and to enjoin the Wheeling from participating in the arrangement, was that the things which the Wheeling proposed to do in carrying out the plans were *ultra vires* of the Wheeling's charter. Upon this point this Court said:

> "Second. The prayer that the contemplated action of the Wheeling should be enjoined because its directors hold office illegally, are faithless to their trust, are acting in violation of the rights of stockholders under the Ohio law, and, hence, that the Wheeling could not legally exercise the authority granted to it by the Commission, was not properly joined in this suit and is not subject to review in this Court on a direct appeal. An application for such relief may not be included in a bill under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission. Compare *Cleveland, C. C. & St. L. R. Co.* v. *United States,* 275 U. S. 404, 414, 72 L. ed. 338, 344; *Great Northern R. Co.* v. *United States,* 277 U. S. 172, 181, 72 L. ed. 838, 841. It is neither ancillary to nor dependent upon the judgment as to the order. Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the district court. Such a suit would be heard in ordinary course by a single judge; and it would be appealable only to the Circuit Court of Appeals. The case at bar is wholly unlike the Chicago Junction Case (*Baltimore & Ohio R. Co.* v.

United States), 264 U. S. 258, 269, 68 L. ed. 667, 676) where a prayer to set aside the illegal purchase of stock and the lease already made was held proper as ancillary to setting aside the order of the Commission authorizing the same. There, the joinder was permitted in order to carry out the purpose of Congress to make the judicial review effective. Here, such joinder is unnecessary for that purpose."

Both of the two last cases cited arose under the Interstate Commerce Act and show that the same rule as obtains generally applies in respect to the administration of its provisions. The question of *ultra vires* cannot be raised collaterally in a proceeding like the case at bar. Even if, as we deny, the Chesapeake Beach Railway Company exceeds its charter power by engaging in the operation of a ferry, whether it be a general ferry or a railroad ferry, the question cannot be raised by one who is merely a competitor, like the appellant.

CONCLUSION.

The Railway Company now suffers from a lack of traffic due to competition with other agencies of transportation and the small productivity of the local area which it serves. Just across the bay from its eastern terminus at Chesapeake Beach is a rich and productive country suffering from an inadequacy of transportation facilities. Its projected extension will serve the dual purpose of improving its financial strength and of furnishing a needed public service. It applied to the Commission for a certificate of public con-

venience and necessity authorizing a combination railroad and general vehicular and passenger ferry across to the Eastern Shore. It submitted at the hearing before the Commission not only substantial but convincing evidence on each of those two branches of the case. Its application and its evidence were accepted by the Commission as made in good faith and as trustworthy. These findings are conclusive since they are based on substantial evidence.

Combination railroad and general and vehicular ferries are within the exclusive jurisdiction of the Commission in respect to their interstate business, and the decision in *New York Central and H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 57 L. ed. 499, is controlling on this point. The proposed ferry will be engaged in interstate commerce in both departments of activity. The order is valid even though construed as authorizing a strictly railroad ferry, and even on that basis it is supported by substantial and convincing evidence.

There is no issue in this case concerning any attempted evasion of the jurisdiction of the State of Maryland. The State authorities for that reason are taking no part in this suit, although they suggest that they may be compelled to apply to the courts for protection if the railway company attempts to engage in intrastate business without State authority. They specifically state that they have no representations to make about any extensions either by land or by water which the railway company may desire for interstate business (R. 40, 41).

The appellant is not entitled to maintain this action to prevent the construction and operation of the proposed new ferry to serve new traffic and a different territory. It is not entitled to the interposition of a court of equity to protect its present excessive and illegal profits, secured in large part because the travelling and shipping public outside its natural territory are under the present conditions forced to use its facilities.

The essential conflict here is between the needs of the territory for more adequate transportation facilities on the one hand and a greed for monopolistic profits on the other. The movement for a ferry at Chesapeake Beach had its origin, as appellant admits (Brief, 6), with the citizens of the Eastern Shore and it represents a real public demand. The public interest is paramount and should be allowed to prevail.

Respectfully submitted,

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February 11, 1932.

APPENDIX.

Section 4426 of the Revised Statutes of United States (U. S. C. Title 46, c. 14, par. 404), reads in full as follows:

> "The hull and boilers of every ferryboat, canal boat, yacht, or other small craft of like character propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life as may be applicable to such vessels shall, by the regulations of the board of supervising inspectors, also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engineer and a licensed pilot: *Provided, however,* That in open steam launches of ten gross tons and under, one person, if duly qualified, may serve in the double capacity of pilot and engineer. All vessels of above fifteen gross tons carrying freight or passengers for hire, but not engaged in fishing as a regular business, propelled by gas, fluid, naphtha, or electric motors, shall be, and are hereby, made subject to all the provisions of section forty-four hundred and twenty-six of the Revised Statutes of the United States relating to the inspection of hulls and boilers and requiring engineers and pilots, and for any violation of the provisions of this title applicable to such vessels, or of rules or regulations lawfully established thereunder, and to the extent to which such provisions of law and regulations are so applicable, the said vessels, their masters, officers, and owners shall be subject to the provisions of sections forty-four hundred and ninety-six, forty-four hundred and ninety-seven,

forty-four hundred and ninety-eight, forty-four hundred and ninety-nine, and forty-five hundred, relating to the imposition and enforcement of law.

"All vessels of fifteen gross tons or less propelled in whole or in part by gas, gasoline, petroleum, naphtha, fluid, or electricity, and carrying passengers for hire, shall carry one life-preserver, of the sort prescribed by the regulations of the board of supervising inspectors, for every passenger carried, and no such boat while so carrying passengers shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. No examination shall be required as a condition of the obtaining of such a license, and any such license shall be revoked or suspended by the local board of inspectors for misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the holder, and if revoked, the person holding such license shall be incapable of obtaining another such license for one year from the date of revocation."

Below are given extracts from General Rules and Regulations prescribed by the Board of Supervising Inspectors, covering bays, sounds, and lakes, other than the Great Lakes. Rule 7—Ferryboats, pages 123-124, reads as follows:

"1. The navigation of ferryboats shall be confined to the ferry routes specified in the certificate of inspection; but such vessels may be permitted to go beyond their authorized routes with passengers only, or, without such permit, to lighten or relieve vessels in distress. When any ferryboat leaves her ferry route and carries passengers, she shall be required to carry the

same officers, crew, and equipment as required of other steamers carrying passengers (Sec. 4426, R. S.).

"2. All ferryboats of more than 75 gross tons carrying passengers for hire, the construction of which is commenced after March 31, 1913, shall be supplied with a sufficient number of water-tight bulkheads to float the vessel if any compartment is flooded. After February 15, 1927, any vessel of 75 gross tons and under which shall be certificated for the first time for any ferry route on which passengers are carried for hire shall be supplied with bulkheads as required by this section, except that such vessels of 75 gross tons or under may, in lieu of such bulkheads, be equipped with substantial air tanks under deck of sufficient capacity to sustain the vessel afloat when full of water, with the full complement of passengers and crew on board. Such air tanks shall be so distributed as to secure maximum stability (Sec. 4426, R. S.).

"3. All ferryboats of 50 gross tons or over shall be equipped with such lifeboats, life rafts, outside ladders, and other means of escape, in case of disaster, as, in the opinion of the inspectors, shall meet the requirements of each particular case. But in no case shall the cubic feet of boat capacity be less than that provided in the table following:

	Cubic feet.
Ferryboats of 50 and not over 300 gross tons	120
Ferryboats over 300 and not over 600 gross tons	240
Ferryboats over 600 gross tons	360

"*Provided*, That ferryboats of more than 300 gross tons shall be equipped with boats or rafts as in the opinion of the inspectors may be necessary in case of disaster to secure the safety of all persons on board (Sec. 4426, R. S.).

"4. All ferryboats shall be equipped with a life preserver for each person carried, and in addition thereto shall have a number of life preservers suitable for children equal to at least 10 per cent of the total number of persons carried. All life preservers shall be distributed in the most accessible places, where they can be reached at all times.

"All ferryboats shall be provided with the same fire apparatus required on passenger steamers of equal tonnage (Sec. 4426, R. S.).

"5. All car-ferry steamers transporting passengers in cars shall carry the same life-saving and fire-fighting equipment as required on ferryboats, excepting that the number of life preservers shall equal the number of persons carried (Sec. 4426, R. S.).

"6. It shall be the duty of the master of any such car-ferry steamer to see that all of the doors of the cars are unlocked and that the vestibules of the cars are open while the cars are on the steamer, to allow the persons so carried free egress at all times" (Sec. 4426, R. S.).

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 454

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
APPELLANT,

vs.

UNITED STATES OF AMERICA, ET AL., APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR CHESAPEAKE BEACH RAILWAY COMPANY, APPELLEE, IN ANSWER TO BRIEF FOR STATE OF MARYLAND, AMICUS CURIAE.

The appellant, the Claiborne-Annapolis Ferry Company, is seeking to set aside an order of the Interstate Commerce Commission authorizing the Chesapeake Beach Railway Company to extend its railroad across Chesapeake Bay by ferry. The statutory court below dismissed the bill of complaint as without merit and the Ferry Company appealed. There have been filed an

opening brief by appellant, answer briefs by appellees, and a reply brief by appellant. On February 15, 1932, the State of Maryland was granted leave to file a brief as *amicus curiae* and the Railway Company was given the right to make an answer within ten days, and the present brief is being filed pursuant to such permission. The case was argued February 18th.

Questions Presented by State of Maryland.

The contentions advanced in the brief for the State of Maryland may be grouped under four headings:

1. The order of the Commission authorizes both a railroad and a general vehicular and passenger ferry.
2. The Railway Company is seeking to evade the jurisdiction of the State of Maryland by falsely pretending to seek authority for a railroad ferry, when it is planning an exclusively general ferry.
3. There is no substantial evidence supporting that part of the certificate of the Commission authorizing a railroad ferry.
4. Only a strictly railroad ferry is within the jurisdiction of the Interstate Commerce Commission.

ARGUMENT.

I.

The correct construction of the Commission's order is that it authorized both a railroad and a general ferry.

We agree with the argument made by the State that the certificate of the Commission authorizes both a railroad and a general ferry, that is, a combination ferry

Paragraph 3 of the application filed by the Railway Company with the Commission reads as follows:

> "It is proposed to establish and operate, either directly or through a wholly owned subsidiary, a ferry for the transportation of passengers and property between the terminus of its said line at Chesapeake Beach, across Chesapeake Bay, and a point on Trippe's Bay in Dorchester County, Maryland."

Paragraph 5 reads as follows:

> "The present and future public convenience and necessity require the establishment of the proposed ferry so as to afford a direct route by rail and water between the City of Washington and surrounding territory and the eastern shore of Maryland and also provide a direct route for the transportation of automobiles and other vehicles between such points."

The report of the Commission shows beyond the possibility of doubt that both a railroad and a general ferry were proposed by the applicant and supported by the evidence (R. 18-32).

The certificate of the Commission recites that the present and future public convenience and necessity require the establishment of ferry service "as set forth in the application and said report" (R. 32, 35).

The proper construction of the certificate is that it covers both kinds of service, because that was beyond doubt the real intention of the Commission.

Under the circumstances, we agree with the State of Maryland that the broader construction, the one authorizing both kinds of service, must necessarily be

adopted. We further submit that the order so construed is valid in every respect, for reasons that we shall presently show.

II.

Charge of false pretenses and attempted evasion of State jurisdiction is unfounded.

A. Railway Company was compelled to seek authority for ferry from Interstate Commerce Commission.

The Railway Company is a common carrier subject to the Interstate Commerce Act under which the term "railroad" is defined as consisting in part of "ferries used by or operated in connection with any railroad."

The Act also prohibits under penalty of fine or imprisonment the extension of any railroad without authority from the Commission. It would be physically impossible for the Railway Company to operate a ferry across the Bay from its present eastern terminus at Chesapeake Beach without such a ferry being used by or operated in connection with its railroad.

A combination railroad and general ferry is within the province of the Commission, *New York Central & H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 57 L. ed. 499, and it would be next to impossible for an interstate railroad to own and operate a ferry without being subject in this regard to the jurisdiction of the Commission.

When the Railway Company went to the Commission for its certificate of public convenience and necessity, it made its application because it was compelled by law to do so, and not because of any desire to evade the jurisdiction of the State of Maryland.

B. There is no evidence of false pretenses.

Charges of false pretenses or bad faith should not be lightly made. Elementary justice requires that the honesty and integrity of persons should not be impugned without really sufficient cause. And yet the brief for the State makes a charge of false pretense without any supporting evidence of an affirmative nature. Indeed, the whole charge depends upon an inference drawn from the alleged lack of substantial evidence in support of the need for a strictly railroad ferry, an inference which is without justification because its premises are unfounded in fact.

III.

There is not only substantial but strong and convincing evidence of the need for a railroad ferry.

The brief for the State says that the Railway admits that the proposed operation is a general or vehicular ferry service, and that it must be conceded that the evidence of the need for a railroad ferry is negligible. These statements indicate a grave misunderstanding of the issues and the facts of record in the case. The Railway Company applied to the Commission for authority for a combination railroad and general ferry, and has at all times maintained that this was the object it had in view. It has likewise consistently maintained that there was substantial and convincing evidence of the need for both kinds of service, and this contention was upheld by the Commission.

The lower court found that there was substantial evidence in support of the need for a strictly railroad ferry (R. 47). Indeed it brushed aside the contention

of the Ferry Company to the contrary, with hardly more than a passing comment. This summary disposition of the matter is fairly indicative of the flimsy nature of the allegation of a lack of substantial evidence.

There is not only evidence but substantial evidence, and not only substantial evidence but a large amount of it in support of the need for a strictly railroad ferry.

Seven witnesses testified to the comparative isolation of the Eastern Shore of Maryland and to the need for additional transportation facilities, particularly for east and west traffic (R. 70, 87, 90, 91, 97, 100, 102). Even the vice-president of the Ferry Company, the most partisan of witnesses, let it escape during the course of his testimony that there has been for years an agitation in favor of increased transportation facilities for the Eastern Shore (R. 115).

The secretary of the Washington Chamber of Commerce, a man whose position requires an intimate knowledge of transportation conditions in Washington and vicinity, testified to the need of better means of transportation between Washington and the Eastern Shore, and his evidence shows that he had in mind all forms of transportation, and not automotive vehicles alone (R. 101, 102).

A witness for the Railway Company asserted that the ferry would handle passengers and package freight moving in conjunction with the railroad, and for the accommodation of this business, the tracks of the Railway Company are to be extended from their present eastern terminus at Chesapeake Beach, a distance of 2,200 feet over the causeway and wharf to a point parallel with the proposed ferry slip, and a freight sta-

tion and a passenger station will be built on the Eastern Shore at Hudson. (R. 67, 68, and Exhibit 16, corrected).

A wholesale dealer in gas and electric appliances of Washington gave evidence that he could use the proposed ferry to good advantage in making less-than-car-load shipments to the Eastern Shore (R. 100).

It is not true, as the State asserts, that all the estimates of ferry revenue are based on traffic, no part of which passes over the existing railroad line. Mr. Fox, vice-president of the Railway Company, a railroad man of wide experience, stated that the earnings of both freight and passenger traffic would be naturally increased by the existence of a ferry service (R. 62). In explaining how he arrived at his estimate of 182,500 passengers, he stated:

> "Assuming that we would handle two hundred and fifty cars per day, average, and the further assumption that each car would contain two paid passengers together with the prospective business that might be handled in connection with bus lines *or in connection with our railroad which would bring the passengers to and from the ferry,* we arrived at that figure" (R. 67). (Italics ours.)

It is true that there are no elaborate separate estimates of revenues anticipated from strictly railroad traffic passing over the ferry. But such estimates are not the sole means by which proof of public convenience and necessity may be established. In the nature of things they are but predictions and little better than guesses. The important inquiry is always whether the

community into which the extension is projected is in need of the service. An extension is necessarily in the public interest if it relieves the situation in a territory inadequately served by present transportation facilities. *Construction of Line by Wenatchee Southern Ry. Co.*, 90 I. C. C. 237, 255; *Gt. Northern Ry. Co. Construction*, 166 I. C. C. 3, 39. In the former case the Commission pertinently observed that the history of railroad construction illustrates that prospective tonnage depending for its development upon transportation facilities rather than tonnage immediately in view has been the main justification for railway construction.

This Court held in *Texas and N. O. R. R. Co.* v. *Northside Belt Ry. Co.*, 276 U. S. 475, 72 L. ed. 661, 663, that the purpose of paragraphs 18 to 22 of Section 1 of the Act is to prevent interstate carriers from weakening themselves by construction or by operation of superfluous lines and to protect them from other carriers' operating in interstate commerce a competing line not required in the public interest.

It was, we submit, no part of the purpose of the law to prohibit railroads from building extensions into communities in need of additional transportation facilities. It obviously cannot be said of such extensions that they are superfluous or are not required in the public interest.

Proof of the inadequacy of present facilities is of itself sufficient evidence to support a finding by the Commission that public convenience and necessity require the construction of the extension. In this case there is testimony from Mr. Fox, a man with a lifelong experience in railroad affairs, that a railroad ex-

tension would supply an existing public need. The Commission was entitled to believe this evidence. It was moreover entitled, once the inadequacy of present facilities was established, to draw the inference that the situation could be met by a railroad extension. It did draw this very inference and its conclusion on this question of fact peculiarly within its province as an expert tribunal is not open to question. It is certainly not open to the State to establish the contrary by mere argument to the effect that the proper inference is that the public requirements can be met by automotive transportation alone and not in any part by a railroad extension.

The only evidence that could possibly be construed as showing that there is no need for railroad service is the fact that the Claiborne-Annapolis Ferry Company handled little or no freight in the years 1922 to 1928 (R. 185). But it had never attempted to develop any business of this sort (R. 121). It had no incentive to do so because even without handling freight it often has more business than it can handle (R. 103). The only railroad connection with the Claiborne-Annapolis Ferry Company is the Washington, Baltimore and Annapolis Railway Co., an electric inter-urban line (R. 1, 20), which so far as this record shows may or may not interchange freight with the national transportation system of steam railroads.

The Railway Company, on the other hand, interchanges with both the Baltimore & Ohio and the Pennsylvania railroads, and it would have an incentive to develop a freight business, because unlike the Claiborne-Annapolis Ferry Company, its revenues from this busi-

ness would not be limited to ferriage across the Bay but would also include compensation for the movement over its rail lines.

The record contains affirmative evidence, however, that the new ferry will be able to secure passengers other than those traveling in automobiles and busses. The record shows that 780 cars a day go to Claiborne, the eastern terminus of the old ferry (R. 73). Only 209 vehicles a day, however, use the ferry across the Bay (R. 117). It is fair, we think, to infer, as appellant did in its opening brief (p. 58) that the remaining automobiles came to Claiborne simply to transport passengers to or from the ferry. This shows that the old ferry has passengers in considerable number who do not cross in automobiles or busses. It is not unfair to infer that some of them use the Washington, Baltimore and Annapolis Railroad. These circumstances afford a reasonable basis for believing that there is a class of travelers who could be attracted to the combination rail and water service projected by the Railway Company.

The evidence reviewed above is but part of that supporting the need for a railroad ferry, but it is sufficient to show that what the record contains is not only substantial but convincing evidence on this point.

IV.

Most of the evidence relates to need for general ferry because that was sole controverted issue before Commission.

The brief for the State of Maryland contends that the decision of the Commission is confined to a discus-

sion of the advantages of a general as opposed to a railroad ferry service across the Bay.

While this is not altogether true, as a reading of the decision will disclose, it nevertheless is a fact that much of the report is devoted to the general ferry aspects of the application. The same thing is true of the evidence of record although to a much less pronounced degree.

What is the explanation for this situation?

The reason is simple. Although wide notice was given of the application for a combination railroad and general ferry, there was but one party to the proceeding before the Commission other than the applicant Railway Company. No railroad serving the Eastern Shore came in with an objection that the proposed extension would invade its territory. The only intervenor was the Claiborne-Annapolis Ferry Company, operating a general ferry across the Bay some twenty to thirty miles distant from the new project. It had no representations to make about a railroad ferry. Indeed even after the decision of the Commission had been rendered, it filed a petition for modification in which it said:

> "4. That your petitioner does not question the authority or the wisdom of this Honorable Commission in granting to the applicant a Certificate of Public Convenience and Necessity if the Commission construes the application of the Chesapeake Beach Railway Company in this case to be an application for a certificate authorizing an extension of its railroad". (R. 170).

At the hearing, there was no controversy between the only two parties, the Railway Company and the Ferry Company, as to the need for a railroad ferry.

The Railway Company of course had the burden of sustaining its application relating to railroad ferry service; and as we have already seen, it met this burden by offering substantial and convincing evidence.

But the only controverted issue related to the need for a general ferry, which was disputed by the Ferry Company, and it is only natural that the Railway Company should have shaped its presentation with this fact in view, and that the emphasis should have been placed on establishing the disputed, rather than the undisputed, point in the case. It is likewise natural that the evidence on this point was of a larger volume, and that the Commission in its report should have concerned itself very largely with the great mass of evidence on the only controverted issue.

V.

State of Maryland should not be allowed at this late date to raise issues of fact in this Court.

In accordance with the Act (Section 1 (19)) the State of Maryland was given due notice of the application for a combination railroad and general ferry, when it was filed with the Commission by the Railway Company. The Public Service Commission of the State thereafter advised the Federal Commission that it did not desire to make any representations in the proceeding (R. 18).

After the report and order in this case had been issued, and the Ferry Company had petitioned for a modification of the order, the Maryland Commission wrote to the Interstate Commerce Commission protesting against an assertion on brief by the Railway Company that the State was estopped to object to the order.

In this letter it reiterated that it had no representations about any extensions either by land or water which the Railway Company might desire to make for interstate business, but said that if the Railway Company undertook an intrastate business without its consent, it would be compelled to apply to the courts for the protection of its authority and the sovereignty of the State. No action by the Interstate Commerce Commission was requested, and it is difficult to understand the complaint of the State (Brief, 6) that no action was taken upon this protest.

If the Maryland Commission had desired action by the Interstate Commerce Commission it could and undoubtedly would have intervened in the manner provided for by the rules, which it had the undoubted right under the Act to do. But what the Maryland Commission intended by this letter was obviously to threaten the Railway Company with court proceedings, rather than to request any action by the Interstate Commerce Commission. Even as to the Railway Company, the threat of a suit was only in the event of an attempt to engage in intrastate business without authority of the State.

The State thus declined to take part in the proceedings before the Commission, the body appointed by law to hear and determine the facts in cases of this kind. The application of the Railway Company, like the certificate later granted, was for an extension for both railroad and general ferry purposes, and if the State had any representations of fact to make, the appropriate time and place was at the hearing before the Interstate Commerce Commission.

If it desired to show that there was no need for railroad ferry service; if it desired to establish that the Railway Company was actuated by false pretenses, it should have presented its evidence to the Federal Commission.

After having failed and refused to put those questions of fact in issue before the appointed tribunal, it now seeks to raise them for the first time before this Court in a brief as *amicus curiae* filed at the last minute.

Its action, we submit, comes too late.

This is true with respect to the charges of false pretenses and of attempted evasion of the State's jurisdiction. It is likewise true with respect to the charge that there is no evidence to support the order. All of these charges are dependent upon factual proof, upon which the administrative tribunal should have been allowed to pass in the first instance.

VI.

Both the railroad and general and vehicular business of a ferry used by or operated in connection with an interstate railroad are under the Interstate Commerce Commission.

In its brief the State attempts to draw a sharp distinction between a railroad ferry and a general ferry. None of the cases it cites, however, arose under the Interstate Commerce Act, the statute here involved. It may well be that there is a distinction between the term "railroad ferry" and that of "ferries used by or operated in connection with any railroad" as used in Sec-

tion 1 (3) of the Act, and hence there is no point in talking about the proper definition of "railroad ferry" when this case is concerned with the definition of a different term "ferries used by or operated in connection with any railroad". However that may be, the latter term, which is the one in issue here, was authoritatively defined by this Court in *New York Central & H. R. R. Co.* v. *Hudson County*, 227 U. S. 248, 57 L. ed. 499, as including a combination railroad and general ferry, such as is covered by the certificate granted the Railway Company in this case.

The proposed ferry will even in its general ferry business be engaged in interstate commerce. It will convey across the Bay busses, trucks and private automobiles on journeys from points in the lower Eastern Shore of Maryland and Virginia to points in other States. Busses and trucks so engaged are beyond the regulatory power of States. *Buck* v. *Kuykendall*, 267 U. S. 307, 69 L. ed. 623; *Bush & Sons* v. *Maloy*, 267 U. S. 317, 69 L. ed. 627.

In conveying vehicles moving in interstate commerce across a navigable water of the United States, the ferry will itself be engaged in interstate commerce. *Harmon* v. *Chicago*, 147 U. S. 396, 37 L. ed. 216; *Moran* v. *New Orleans*, 112 U. S. 69, 28 L. ed. 653; *Foster* v. *Davenport*, 22 How. 244, 16 U. S. L. ed. 248.

The mere fact that the part of the movement participated in by the ferry will be from one point to another within the State of Maryland does not prevent the traffic from being interstate under the circumstances here involved. *United States* v. *Erie R. Co.*, 280 U. S. 98, 74 L. ed. 187 (annotated); *United States* v. *Union*

Stock Yard & Transit Co., 226 U. S. 286, 57 L. ed. 226.

It is immaterial whether the participating carriers are parties to some common control, management or arrangement for a continuous carriage or shipment. *Railroad Commission* v. *Worthington*, 225 U. S. 101; 56 L. ed. 1004; *The Daniel Ball* v. *United States*, 10 Wall. 557, 19 U. S. L. ed. 999.

The ferry will be under the admiralty jurisdiction of the United States and will be inspected under the Steamboat Inspection Laws. *Section* 4426 *Revised Statutes, U. S. C. Title* 46 *c.* 14, *par.* 404; *The Daniel Ball* v. *U. S.*, 10 Wall. 557, 19 U. S. L. ed. 999; *Vidalia* v. *McNeely*, 274 U. S. 676; 71 L. ed. 1292, 1295.

Since both the railroad and the general ferry business of the extension will be within the Federal field, the provision of Section 1 (20) of the Act, that the holder of a certificate of public convenience and necessity may, without securing approval other than such certificate, proceed with the operation of such extension, must be given full force and effect, and the Commission's order authorizing a combination railroad and ferry service must be regarded as wholly within its competency.

CONCLUSION.

The evidence in this case shows that interstate commerce is being impeded by the lack of transportation facilities across Chesapeake Bay, a navigable water of the United States.

It also shows that the Railway Company, a common carrier in interstate commerce, is unable to draw a sufficient amount of traffic from the restricted territory

which it now serves, making for some uncertainty as to whether it will be able under existing conditions to continue to fulfill its present public service obligations. It shows, moreover, that if permitted to extend its service across the Bay and develop new traffic from that fertile and productive region, its prospects of survival, and its continued public service, in increased measure, will be assured. The Commission rightly found on a record containing substantial and convincing evidence that both a railroad and a general ferry service were justified, and its certificate to that effect should be upheld.

Respectfully submitted,

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Of Counsel.
February 25, 1932.

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CHARLES E

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 454.

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
Appellant,

versus

UNITED STATES, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

PETITION OF THE STATE OF MARYLAND AND BRIEF AS AMICUS CURIAE.

WILLIAM PRESTON LANE, JR.,
Attorney General,

WILLIS R. JONES,
Deputy Attorney General,

G. C. A. ANDERSON,
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For the STATE OF MARYLAND,
Amicus Curiae.

The Daily Record Co. Print, Baltimore

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ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

PETITION OF THE STATE OF MARYLAND FOR PERMISSION TO FILE A BRIEF AS AMICUS CURIAE.

To the Honorable, the Justices of the Supreme Court of the United States:

Now comes the State of Maryland, by its Attorney General, and respectfully shows unto Your Honors:

I. That the above entitled cause involves the valdiity of an order passed by the Interstate Commerce Commission.

II. That the order complained of authorizes the Chesapeake Beach Railway Company to establish and operate a general or vehicular ferry service from point to point within the State of Maryland, namely, across Chesapeake Bay, from Chesapeake Beach, Calvert County, Maryland, to Seward's farm, Trippe's Bay, Dorchester County, Maryland.

III. That the Chesapeake Beach Railway Company applied to the Interstate Commerce Commission for authority to extend its line of railroad across Chesapeake Bay by ferry, but it appears from the record that the Railway Company does not now, and will not in the future, have railroad business—either passenger or freight—to be transported across Chesapeake Bay, and that its sole purpose, in making the application, is to promote a general or vehicular ferry service.

IV. That the effect of the order is to enable the Chesapeake Beach Railway Company to evade and ignore the jurisdiction of the State of Maryland over ferries within its borders.

V. That, if the Chesapeake Beach Railway may establish and operate an intrastate service under the guise of complying with Sec. I, par. 18 of the Interstate Commerce Act, as amended, other ferries across the Chesapeake Bay and other waters of State will be enabled to evade and ignore the jurisdiction of the State of Maryland, and its control and supervision over this class of common carriers within the State will be broken down and destroyed.

VI. That the State of Maryland has a vital interest in the case, and contends that its rights and sovereignty

are invaded by the order of the Interstate Commerce Commission.

WHEREFORE, the State of Maryland respectfully prays leave to file a brief in this proceeding as *amicus curiae*.

Respectfully submitted,

THE STATE OF MARYLAND,

By WILLIAM PRESTON LANE, JR.,
Attorney General,

WILLIS R. JONES,
Deputy Attorney General,

G. C. A. ANDERSON,
Assistant Attorney General.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 454.

CLAIBORNE-ANNAPOLIS FERRY COMPANY,
Appellant,

versus

THE UNITED STATES OF AMERICA, CHESAPEAKE BEACH RAILWAY COMPANY, AND INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR STATE OF MARYLAND, AMICUS CURIAE.

Question Presented.

The sole question in which the State of Maryland is interested is whether the Interstate Commerce Commission, under the guise of regulating interstate commerce, may deprive the State of its jurisdiction over ferries operating from point to point within its boundaries, in the absence of evidence, or substantial evidence, that public convenience and necessity require interstate service.

ARGUMENT.

It must be conceded, on this record, that evidence of public convenience and necessity for the extension of the Chesapeake Beach Railway line by ferry across Chesapeake Bay is negligible, and that the "primary purpose," in the language of the Commission—and, indeed, the sole purpose—is the operation of a general ferry service from Chesapeake Beach, on the Western Shore, to Trippe's Bay, on the Eastern Shore.

The report and order of the Interstate Commerce Commission, dated August 1, 1930, embrace a discussion of the advantages of a *general ferry service* across Chesapeake Bay at the points designated in the application, a discussion plainly irrelevant if the Commission was simply making a finding based on the alleged need of the extension of a railroad line. On September 2, 1930, the intervener, The Claiborne-Annapolis Ferry Company, petitioned the Interstate Commerce Commission to modify its report, order and certificate so as to make it clear that the Commission was acting within the statute, and not attempting to authorize an intrastate service (R., pp. 169-171). On September 5, 1930, the Chesapeake Beach Railway Company, the applicant, filed a reply opposing the petition for modification, stating that the matter

> "was tried upon the theory that the application was one for the extension of applicant's line by the establishment of a ferry which, in addition to handling interstate traffic, *would also handle intrastate traffic, consisting of the transportation of automobiles and other vehicles with their passengers.* This was the only possible ground which the intervenor would have for opposing the application * * *" (R., pp. 172, 173).

The applicant went on to point out that the Examiner of the Interstate Commerce Commission, upon consideration of the evidence, recommended the certificate for the service *"as proposed by the applicant"* (R., p. 173).

The applicant also emphasized the fact that the Claiborne-Annapolis Ferry Company had filed exceptions to the Examiner's report on the ground that the Interstate Commerce Commission is not authorized by law to grant a certificate for a general ferry service wholly within a State, and pointed out that the Commission had overruled the exceptions, claiming to have jurisdiction (R., pp. 173, 174).

After the applicant had thus argued against the petition, the Interstate Commerce Commission, on October 13, 1930, denied it, adopting the applicant's views with respect to it (R., p. 177).

On October 14, 1930, the Chairman of the Maryland Public Service Commission addressed a protest to the Interstate Commerce Commission, saying that "But if it is proposed to operate a ferry between two points in Maryland and carry passengers, freight and automobiles in an intrastate traffic which has no connection with the interstate business of the company, then this Commission feels that the Interstate Commerce Commission has no authority to grant permission for such an operation * * *" (R., p. 179).

No action was taken upon this protest.

With this record before it, the learned trial court held that "The Ferry Company, in the argument, construed the order as authorizing the Railway to conduct a general ferry business separate and distinct from its railway

business* * * but we do not think we need pass upon this question or determine in this proceeding whether the certificate of convenience issued by the Commission has that effect or not * * *" (R., p. 47).

In this case, therefore, the situation is that the applicant, while pretending to seek permission to extend its railroad line, under the Interstate Commerce Act, based its application almost entirely on evidence of the alleged need for a general ferry, unconnected with the railroad operation. It admits that it endeavored to get permission from the Federal body to conduct an intrastate service. The Examiner recommended that the Commission grant authority for the service "as proposed by the applicant," and the Commission approved the recommendation and overruled all objections that it exceeded its powers.

The three-judge court below declined to rule on the question, raised first before the Interstate Commerce Commission and again before it, saying "The Ferry Company may not, as we think, for any reason shown on the record, annul the certificate or avoid its effect, *whatever that may be.*" (Italics ours).

We submit that there is no good reason why the parties to this proceeding and the State of Maryland should be left to speculate further as to the effect of the Commission's order. If this Court believes that there is sufficient evidence in the record to show public convenience and necessity for the extension of the rail line by ferry across Chesapeake Bay, then all that is left to be decided is whether the Commission limited its order to the subject-matter over which the Congress gave it jurisdiction; or whether the effect of the order is to authorize a general ferry service wholly within a State.

Sec. 1, Par. 2 of the Transportation Act provides that it shall not apply to the transportation of passengers and property wholly within one State.

The distinction between a railroad ferry and a general ferry has often been made by the courts.

St. Clair Co. vs. Interstate Transfer Co., 192 U. S. 454, 466-467.
Golden Gate Ferry Co. vs. Railroad Com., 204 Cal. 305.
Fitch vs. New Haven, etc., 30 Conn. 38.
The Maverick, 16 Fed. Cas. (No. 9316) 1186.
Chesapeake Ferry Co. vs. Hampton Roads, 133 S. E. (Va.) 561.

It is unnecessary, in this brief, to detail the other circumstances, such as the approval by the Commission of plans for large expenditures, amounting to $700,000, for two ferry boats, each designed to carry 95 automobiles and 1,800 passengers, indicating conclusively that the proposed operation is what the Railway admits it is—a general or vehicular ferry service. But these facts do furnish urgent reasons why this Court should not leave the question of the powers of the Commission, or of the extent of the franchise granted, to some other and later proceeding, after large sums have been expended, perhaps uselessly, and much damage has been done to the carriers affected.

It is argued that *Colorado vs. United States*, 271 U. S. 153, and *Transit Commission vs. United States*, No. 498, decided January 4, 1932, are authority for the proposition that, in passing upon an application for an extension of railroad, the Commission is empowered to con-

sider the transportation needs of the community to be served, and that "it is therefore immaterial that in this case a very large part of the ferry revenue will be from traffic which does not also pass over the existing railroad line."

Brief for the United States and The Interstate Commerce Commission, p. 23.

We submit that these cases cannot be twisted into the approval of an application for an extension (by ferry) under which *all* the estimates of ferry revenue are based on traffic (vehicles and their passengers) *no part of which passes over the existing railroad line;* nor into an approval of an admitted attempt to establish an intrastate service without the permission of the State. (The applicant here even claims that the State is estopped from objecting. R., p. 176).

The ferries in Maryland, as elsewhere, are part of the highway system. Those now in operation, from one State road to another, are subsidized on the basis of annual maintenance cost per mile. The applicant regards the proposed ferry, not as a railroad extension, but as part of the Maryland highway system, and has announced its intention of seeking a subsidy amounting to $16,000 annually (R., p. 132).

The State has a vital interest, not only because of the annual subsidies it provides, but also in promoting the operation of ferries where most advantageous for the transportation of passengers and vehicles, so that the convenience and business needs of its people may be served. It has granted franchises where it appeared desirable, taking care that new services did not unduly

hamper or interfere with the usefulness of those already in existence. The State, through its authorized agencies, is, of course, in a better position than any outside agency to judge of the necessities of traffic on its highways within its borders, and to determine upon the responsibility of those who seek franchises, their ability to provide the promised service, and the effect, if any, upon the utilities already exercising franchises.

The Chesapeake Beach Railway Company seeks to establish a ferry service within the State of Maryland without a certificate from the Public Service Commission of Maryland. Its method is to appear to follow the Interstate Commerce Act, but, in substance, its action is an attempted evasion of the authority of the State. If it succeeds, other ferries, hiding under the cloak of "railway extensions" may escape the authority of the State, and impair and destroy services built up and maintained in the public interest after many years of effort. What is done in Maryland may, of course, be duplicated in other States, and State authority over its highways and ferries broken down for all-time. Certainly no such result was contemplated when this Court held in *St. Clair Co. vs. Interstate Transfer Co., supra,* that a railroad ferry was not a general ferry. It is a far cry from that decision to the instant case, where an effort is made to have the Interstate Commerce Commission and the courts hold that a general ferry is a railroad ferry.

CONCLUSION.

We submit that the decree of the trial court should be reversed, and that the order and certificate of the Interstate Commerce Commission, attempting to grant author-

ty to establish a general ferry within the State of Maryland, be declared nugatory, null and void.

Rsepectfully submitted,

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IN THE

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OCTOBER TERM, 1931.

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CLAIBORNE-ANNAPOLIS FERRY COMPANY,
Appellant,

versus

UNITED STATES, ET. AL.,
Appellees.

APPELLANT'S PETITION AND BRIEF FOR REHEARING AND RECONSIDERATION.

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The Daily Record Co. Print, Baltimore

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APPELLANT'S PETITION FOR REHEARING AND RECONSIDERATION.

Now comes appellant, Claiborne-Annapolis Ferry Company, by counsel, and respectfully petitions this Court for a rehearing herein and a reconsideration of its opinion announced on April 11, 1932, upon the following grounds and for the following reasons, more elaborately discussed in its brief hereto appended:

1. The Court inadvertently (it is believed) held that a suit to set aside a certificate of public convenience and necessity of the Interstate Commerce Commission for the extension of a line must be brought under Paragraph 20, Section 1, of the Transportation Act (under which the procedure has always been before a single judge, followed by an appeal to a Circuit Court of Appeals and *cer-*

tiorari from this Court) rather than under Section 212 of the Judicial Code (originally the Commerce Court Act, June 18, 1910, Chap. 309, 36 Stat. at L. 542; Comp. St. Sec. 1005).

2. The Court inadvertently (it is believed) stated that no person other than appellant objected before the Interstate Commerce Commission to the issuance of the certificate.

3. The Court inadvertently inaccurately stated appellant's basis of attack on the certificate and then decided the case by disposing of such inaccurate statement.

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Attorneys for Appellant.

IN THE

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CLAIBORNE-ANNAPOLIS FERRY COMPANY,

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Appellees.

BRIEF FOR APPELLANT IN SUPPORT OF PETITION FOR REHEARING AND RECONSIDERATION.

The decision in this case involves much more than appellant's property rights. It directly concerns the sovereignty of the State of Maryland. If counsel correctly construe it, it divests the State of Maryland (and every other state) of jurisdiction over local vehicular ferries forming a part of their respective public highway wherever such ferries are located in the vicinity of a railroad and vests control thereof in the Federal Government. Such a revolutionary step in the direction of centralization warrants, we believe, a re-examination of the opinion in the respects hereinafter indicated.

I.

THE COURT INADVERTENTLY HELD THAT THIS SUIT WAS BROUGHT UNDER PARAGRAPH 20, SEC. 1, OF THE TRANSPORTATION ACT.

The opinion states that

> "the right of appellant Ferry Company to institute and maintain this proceeding *rests wholly upon the permission granted by Paragraph* 20, *Sec.* 1. 'Any party in interest' may institute a suit to enjoin proposed construction, operation, or abandonment of a carrier's line unless it has obtained a certificate of public convenience and necessity from the Interstate Commerce Commission." (Italics ours.)

The opinion then holds, in substance, that a void certificate is no certificate at all, and that, where a carrier is proceeding under a void certificate (as claimed in the case at bar), the right to institute and maintain a suit to set it aside "rests wholly upon the permission granted by Paragraph 20, Sec. 1."

This statement, it is believed, was inadvertent and will confuse what has, up to this time, been the well settled procedure in cases of this sort. A proceeding to set aside an order of the Interstate Commerce Commission has heretofore always been instituted under Section 212 of the Judicial Code (originally the Commerce Court Act, June 18, 1910, Chap. 309, 36 Stat. at L. 542; Comp. Stat., Sec. 1065). This section was omitted from the United States Code Annotated, but it has never been repealed and is still the law. *Baltimore and Ohio Railroad Company, et al., vs. United States, et al.* (Chicago Junction Case), 264 U. S. 258, 68 L. ed. 667.

Paragraph 20, Sec. 1, of the Transportation Act was believed, up to this time, to apply to cases where no

certificate, *in fact*, had been secured from the Interstate Commerce Commission but abandonment or extension by a carrier had nevertheless been undertaken. See *Western Pacific California Railroad Company vs. Southern Pacific Company*, decided November 23, 1931, Oct. Term, 1931, No. 51.

Any proceeding under Section 212 of the Judicial Code must be had before a special three-judge court provided for by Tit. 28, Sec. 47, U. S. C. A., from which court an appeal lies direct to this Court. See *Transit Commission, etc., vs. United States*, decided January 4, 1932. A proceeding under Paragraph 20, Sec. 1, has always been before a single judge from whose decision it has never been believed that a direct appeal would lie. See *Western Pacific, etc., vs. Southern Pacific Company, supra.*

Hence, when this Court holds in the instant case, that the right to maintain the suit "rests wholly upon the permission granted by Paragraph 20, Sec. 1," it has thrown into confusion a hitherto well-settled procedural matter.

It is believed that the portion of the opinion just discussed, or at least the statement that the right to maintain the action "rests wholly upon the permission granted by Paragraph 20, Sec. 1," was inadvertent and that the Court would wish to strike it from its opinion.

II.

THE STATE OF MARYLAND OBJECTED BEFORE THE COMMISSION TO THE ISSUANCE OF THE CERTIFICATE.

Passing now to what we consider to be the second inadvertence in the opinion, it is stated that the Claiborne-Annapolis Ferry Company, appellant here, intervened before the Commission and that "no other party asked

to intervene or *offered objection to the requested certificate.*" (Italics ours.)

The Court apparently overlooks the fact that, whereas the State of Maryland offered no objection to the Railway Company's application *to extend its line by ferry,* nevertheless, as soon as it became apparent to the Public Service Commission of Maryland that the so-called "extension" was merely a pretext for securing permission from the Interstate Commerce Commission to establish a general vehicular ferry, it filed a most vigorous protest with the Interstate Commerce Commission (see R., pp. 40-41).

While this fact may be of small importance at the moment, it may very well be that, at a later date, the State of Maryland may seek its day in court in connection with the matters here in controversy, at which time, should such a course of action materialize, it would be obviously unfair for this Court to have intimated in its present opinion that the State of Maryland offered no objection to the certificate while the matter was before the Interstate Commerce Commission.

The Court will recall that the Attorney General of Maryland appeared here as *amicus curiae.*

III.

THE MAIN QUESTION IN CONTROVERSY.

Upon the question involving the merits of the case, the opinion is as follows:

> "The bill (in the Court below) alleged that the order and certificate were null and void and without effect because the evidence before the Commission showed the carrier lacked corporate power to operate the ferry and had no actual use therefor in connection with its road; *also, that no present or future*

public necessity and convenience required such operation. (Parenthesis and italics ours.) * * *

* * * "Here, undoubtedly, the Commission had power to entertain and act upon the Railway's petition, also to grant the certificate of public convenience and necessity upon sufficient evidence. If the record discloses such evidence, the certificate is not a nullity and the Ferry Company has no right now to demand decision on any other question.

"We think there was enough evidence—when material and conflicting we may not pass upon its weight—to support the Commission's conclusion. A large district on the Eastern Shore of Chesapeake Bay lacks adequate railroad connection with Washington and points beyond. The possibilities of the proposed ferry, operated as a part of the railway's line, were disclosed and the Commission's conclusion that material advantages to the public would result from additional facilities for interstate transportation is not without support.'"

It is believed that the Court has inadvertently incorrectly stated appellant's position in the Court below and in this Court. The claim was not

"that no present or future public necessity and convenience required" the establishment of the ferry. On the contrary the claim was

(1) That there was no evidence whatsoever disclosing any need or use for a railroad ferry, i. e., a ferry to be used or operated as an extension of the rail line; and

(2) That the alleged need for a general ferry, in the absence of a showing of a need for a railroad ferry, was insufficient to support the Commission's certificate. See Bill of Complaint, Par. 9, R., pp. 5-6; Assignment of Errors, Nos. 1 and 3, R., p. 51.

It is most respectfully insisted that, especially in view of the impairment of state sovereignty here involved, both appellant and the State of Maryland are entitled to a decision upon the questions actually raised and which have not been decided, viz—

1. Does the alleged need for a general or vehicular ferry between two points entirely within the State of Maryland authorize the Interstate Commerce Commission to issue its certificate, in the absence of any showing of a need for a railroad ferry?

2. If the answer to No. 1 is in the negative, then where has this Court found one scintilla of evidence in the record showing any need or use whatsoever for a railroad ferry?

We refer the Court, in connection with Question 2, to pages 24 to 34 of our original brief and pages 6 to 8 of our reply brief.

We refer again to the Court's opinion that "we think there was enough evidence * * * to support the Commission's conclusion."

The opinion does not refer to any evidence in the record as to the *public need* for a *railroad ferry*, and we submit that there is none.

All of the evidence before the Interstate Commerce Commission related to the applicant's attempt to show the need for a general or vehicular ferry. There was no evidence as to the amount of any ferry business to be done as an extension of the railroad line, and no evidence that the ferry would be or could be anything other than an operation independent of and not connected with the railroad, from point to point within the State of

Maryland. There was, we submit, no evidence that would warrant this Court in approving the usurpation of the powers of the Public Service Commission, and in transferring its jurisdiction to the Interstate Commerce Commission.

The curtailment of State sovereignty is, we believe, still a grave, even though now a not uncommon, phenomenon. Since the earliest days of the government, local ferries have been under the jurisdiction and control of the several states. If that jurisdiction is now to be lodged elsewhere—which is the inescapable result of the present opinion—it should not be done in the absence of unambiguous and compelling reasons therefor. The opinion in this case is wholly ambiguous as to the exact basis upon which it disposes of the issue. It cannot be clarified, we believe, without a discussion of the two questions indicated above. We believe and submit that both appellant and the State of Maryland are entitled to enlightenment upon these two points.

We further believe and submit that when these two matters are re-examined the Court will conclude that the certificate was without sufficient basis to support its validity.

CONCLUSION.

It is, therefore, respectfully urged that a rehearing be granted.

PHILIP B. PERLMAN,

JESSE I. MILLER,

GEORGE E. EDELIN,

Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES.

No. 454.—October Term, 1931.

Claiborne-Annapolis Ferry Company, Appellant,
vs.
The United States of America, Chesapeake Beach Railway Company, and Interstate Commerce Commission.

Apppeal from the Supreme Court of the District of Columbia.

[April 11, 1932.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Chesapeake Beach Railway Company, incorporated under Maryland laws and carrier by railroad subject to the Interstate Commerce Act, operates a line twenty-nine miles long which commences in the District of Columbia and passes southeastward through Maryland to Chesapeake Beach, twenty miles south of Annapolis. Connections are made and freight interchanged with the Baltimore & Ohio and Pennsylvania Railroad. The charter empowers it to build and operate a railroad, etc., to construct docks, piers, bridges and retaining walls along the bay shore and to "own and employ steamboats or other vessels to connect the said railroad or railroads with other points by water communication."

December 26, 1929, proceeding under Sec. 1, pars. 18, 19, 20, Interstate Commerce Act, as amended by Transportation Act, 1920, 49 U. S. C., the Railway Company petitioned the Interstate Commerce Commission to grant a certificate declaring "that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation," of the proposed addition or extension to its line. It stated the purpose "to establish and operate, either directly or through a wholly owned subsidiary, a ferry for the transportation of passengers and property between the terminus of its said line at Chesapeake Beach, across Chesapeake Bay [16 miles], and a point on Trippe's Bay in Dorchester County, Maryland." And it averred that "the present and future public convenience and necessity require the establish-

ment of the proposed ferry so as to afford a direct route by rail and water between the City of Washington and surrounding territory and the eastern shore of Maryland and also to provide a direct route for the transportation of automobiles and other vehicles between such points."

Notice was given to the Governor of Maryland; publication followed; all as required by the statute.

The Claiborne-Annapolis Ferry Company (appellant), Maryland corporation, which operates a ferry from Annapolis across Chesapeake Bay, intervened and opposed the Railway's application "for the reason that the ferry service proposed to be operated by the applicant from Chesapeake Beach, Calvert County, Maryland, to a point on Trippe's Bay in Dorchester County, Maryland, will interfere with and hamper the efforts of your petitioner to give adequate service on its present route"—twenty miles further north. It denied that present and future public convenience and necessity requires establishment of the proposed ferry. No other party asked to intervene or offered objection to the requested certificate.

The Commission took evidence, heard the parties, made a report, and, August 1, 1930, certified "that the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company of ferry service across Chesapeake Bay, in Calvert and Dorchester Counties, Md., as set forth in the application and said report."

The Ferry Company asked modification of the report, order and certificate "in such manner as the Commission may deem best to remove any doubt that the permission granted the applicant is only for an extension of railroad and not for the establishment of a general ferry service." Among other things, the petition therefor stated: "Your petitioner does not question the authority or the wisdom of this Honorable Commission in granting to the applicant a Certificate of Public Convenience and Necessity if the Commission construes the application of the Chesapeake Beach Railway Company in this case to be an application for a certificate authorizing an extension of its railroad. That, although the jurisdiction of this Honorable Commission in this case is limited in law to the grant of authority to the applicant to extend its line of

railroad across the Chesapeake Bay by means of vessels, the Report, Order and Certificate filed in this case on their face would seem to indicate that the Commission has attempted to grant to the applicant authority to operate a general ferry across the Chesapeake Bay between the points known as Chesapeake Beach, Calvert County, Maryland, and Trippe's Bay, Dorchester County, Maryland. While your petitioner does not suggest that this Honorable Commission has granted or attempted to grant to the applicant such a certificate, which could be granted only by the State of Maryland, yet the use of the language by the Commission as follows: 'It is hereby certified, That the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company of ferry service across Chesapeake Bay, in Calvert and Dorchester Counties, Md., as set forth in the application and said report' is, we most respectfully submit, misleading and confusing." The request was denied October 13, 1930.

December 24, 1930, appellant here, as sole complainant, filed an original bill in the Supreme Court, District of Columbia, against the Chesapeake Beach Railway Company and all members of the Interstate Commerce Commission, individually and as members thereof. Subsequently, the United States were made parties defendant. No others asked to come in or were added. After stating complainant's business, and that the Interstate Commerce Commission had granted the above described certificate of public convenience and necessity, the bill alleged that the order and certificate were null and without effect because the evidence before the Commission showed the carrier lacked corporate power to operate the ferry and had no actual use therefor in connection with its road; also, that no present or future public necessity and convenience required such operation. The prayer asked an injunction prohibiting the proposed construction, maintenance and operation, pursuant to the order of August 1, 1930, and "that it be adjudged, ordered and decreed that the said order of the Interstate Commerce Commission of August 1, 1930, be set aside and annulled and held for naught." Also, for general relief.

The proceedings before the Interstate Commerce Commission, the evidence presented there and its action were presented to the court. The cause was heard at a special session held by one judge

of the Court of Appeals and two judges of the Supreme Court. 38 Stat. 208, 220, U. S. C., Title 28, Sec. 345. A final decree dismissed the bill and the cause is here upon direct appeal.

Sec. 1, par. 3, Interstate Commerce Act, as amended by Transportation Act, 1930, provides that the term "railroad" as used in the Act, shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad. Paragraph 18 prohibits carriers from extending their lines, or constructing new ones, "unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad." Paragraph 19 prescribes the procedure in respect of applications for such certificates. Paragraph 20,—"from and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both." Chap. 91, 41 Stat. 474, 477, 478; U. S. C. A., Title 49, Sec. 1.

Sections 18, 19, and 20 were added to the Act to Regulate Interstate Commerce by the Transportation Act, 1920. They are restricted to carriers engaged in transporting persons or property in interstate and foreign commerce and were intended to affect intrastate commerce only as that may be incidental to the effective regulation of interstate commerce. *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 213, 217.

Considering *Texas* v. *Eastern R. R. Co., supra, Colorado* v. *United States,* 271 U. S. 153, *Western Pacific California R. R. Co.* v. *Southern Pacific Company,* decided November 23, 1931, October Term, 1931, No. 51, and *Transit Commission and State of New York* v. *United States* (January 4, 1932), it must be held that appellant is a "party in interest" within the meaning of the statute capable of instituting the present proceeding. The bill disclosed that the proposed and permitted action might directly and adversely affect its welfare by changing the transportation situation. The cause is one of the class to be tried by a specially constituted district court, under the Urgent Deficiencies Act, Oct. 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, Sec. 47).

U. S. Code, Title 28, Sec. 46 (Jud. Code, Sec. 208) provides that suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States, &c. Sec. 47 directs that they shall be heard before three judges, at least one of whom must be a circuit judge.

It has been suggested that the Supreme Court of the District of Columbia cannot be regarded as a district court, and judges of the Court of Appeals of the District are not circuit judges within those provisions; consequently the District Supreme Court had no jurisdiction to hear the present cause. The point is without merit.

Section 43, Title 18, District of Columbia Code, 1929, provides that the Supreme Court "shall possess the same powers and exercise the same jurisdiction as the district courts of the United States, and shall be deemed a court of the United States." *Federal Trade Commissioner* v. *Klesner,* 274 U. S. 145, 156, held that Sec. 5, of the Federal Trade Commission Act, conferring jurisdiction on the Circuit Courts of Appeals to enforce, set aside, or modify orders of the Commission, should be construed as conferring like jurisdiction upon the Court of Appeals of the District of Columbia. "The parallelism between the Supreme Court of the District and the Court of Appeals of the District, on the one hand, and the district courts of the United States and the circuit courts of appeals, on the other, in the consideration and disposition of cases involving what among the States would be regarded as within federal jurisdiction, is complete." And see *Pitts* v. *Peake,* 50 Fed. (2d) 485.

Whether the Railway Company has corporate power to operate the proposed ferry is a question which cannot be considered in

this proceeding. We think Congress never intended to impose upon the Interstate Commerce Commission the duty of determining matters of this nature before granting or withholding assent to the construction of an extension. *Cleveland, etc. Ry.* v. *United States,* 275 U. S. 404, 414.

The right of appellant Ferry Company to institute and maintain this proceeding rests wholly upon the permission granted by paragraph 20, Sec. 1. "Any party in interest" may institute a suit to enjoin proposed construction, operation, or abandonment of a carrier's line unless it has obtained a certificate of public convenience and necessity from the Interstate Commerce Commission. In the absence of such certificate the doing of any of these things is declared to be unlwaful—a crime subject to punishment by fine and imprisonment. And the permission is to apply to the court for an order to arrest the unlawful undertaking. The inhibition applies where there is no certificate in fact, or where the Commission lacked power to grant the outstanding one because of insufficient evidence to support its findings or other reason. An invalid certificate would leave the situation as though none had issued. *Chicago, R. I. & P. Ry.* v. *United States,* 274 U. S. 29.

Here, undoubtedly, the Commission had power to entertain and act upon the Railway's petition, also to grant the certificate of public convenience and necessity upon sufficient evidence. If the record discloses such evidence, the certificate is not a nullity and the Ferry Company has no right now to demand decision of any other question.

We think there was enough evidence—when material and conflicting we may not pass upon its weight—to support the Commission's conclusion. A large district on the Eastern Shore of Chesapeake Bay lacks adequate railroad connection with Washington and points beyond. The possibilities of the proposed ferry, operated as a part of the Railway's line, were disclosed and the Commission's conclusion that material advantages to the public would result from the additional facilities for interstate transportation is not without support.

The decree below is affirmed.

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.